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I

Docket Entries
in the
United States Court of Appeals (D.C. Cir.)
in
Democratic National Committee
v. *Federal Communications Commission,*

No. 24,537

DOCKET ENTRIES

DATE		FILINGS-PROCEEDINGS
1970		
Aug.	13	Petition of DNC for review of order of FCC
	14	Certified copies of petition for review mailed to FCC and Attorney General by certified mail
	19	Certified mail receipt returned from Attorney General
	27	Motion of ABC for leave to intervene
	31	Motion of CBS for leave to intervene
Sept.	9	Order granting ABC leave to intervene
	22	Order granting CBS leave to intervene
	23	Certified index to record
Oct.	21	Motion of DNC to extend time to file brief to Dec. 2, 1970
	23	Order extending time to file brief of DNC to Dec. 2, 1970
Dec.	2	Brief for DNC
	2	Joint appendix to briefs
	23	Motion of FCC and CBS to extend time to file briefs to Feb. 3, 1971
	30	Order extending time to file briefs of FCC and CBS to Feb. 3, 1971
1971		
Jan.	13	Motion of CBS to extend time to file briefs for FCC and CBS to Feb. 17, 1971
	18	Order extending time to file briefs of FCC and CBS to Feb. 17, 1971
Feb.	9	Motion of CBS to set case for argument with No. 24,492

DATE		FILINGS-PROCEEDINGS
1971		
Feb.	16	Response of FCC to motion concerning oral argument
	16	Motion of FCC for leave to file motion to extend time to file brief to Feb. 22, 1971
	17	Reply of CBS to FCC's response to motion to set case for argument with related case
	17	Brief for CBS
	17	Brief for ABC
	22	Order granting FCC leave to file motion to extend time to file brief to Feb. 22, 1971 and extending time to file brief of FCC to Feb. 22, 1971
	22	Order scheduling case for argument on the merits with related case
	22	Brief for FCC
Mar.	3	Motion of CBS for additional time for oral argument
	5	Motion of DNC to accept reply brief not in conformity with the court rules
	8	Order accepting reply brief of DNC not in conformity with court rules
	8	Reply Brief for DNC
	8	Order denying CBS additional time for oral argument
	9	Oral argument before Judges Wright, McGowan and Robinson
Aug.	3	Opinion of Court of Appeals by Judge Wright; dissenting opinion by Judge McGowan
	3	Judgment reversing and remanding to FCC
	11	Motion of FCC to extend time to file petition for rehearing to Aug. 31, 1971

DATE		FILINGS-PROCEEDINGS
1971		
Aug.	16	Opposition of BEM to motion of FCC to extend time to file petition for rehearing
	18	Opposition of DNC to motion of FCC to extend time to file petition for rehearing
	27	Motion of ABC for leave to file petition for rehearing
	30	Order extending time to file petition of FCC for rehearing to Aug. 31, 1971
	31	Motion of ABC for leave to file petition for rehearing and suggestion for rehearing en banc
	31	Consent of parties for NBC to file amicus curiae brief
	31	Motion of CBS for leave to file petition for rehearing and suggestion for rehearing en banc
	31	Petition of FCC for rehearing and suggestion for rehearing en banc
Sept.	13	Order granting CBS leave to file petition for rehearing and to file suggestion for rehearing en banc
	13	Petition of CBS for rehearing and suggestion for rehearing en banc
	15	Motion of NBC to file brief as amicus curiae
Oct.	4	Order directing Clerk to file brief of amicus curiae in support of the petition for rehearing
	4	Order denying petition for rehearing
	4	Brief for NBC
	4	Letter to counsel that no judge requested a vote on suggestion for rehearing en banc and that no action will be taken on said petition

DATE		FILINGS-PROCEEDINGS
1971		
Oct.	12	Certified copy of opinion and judgment issued to the FCC
	14	Motion of FCC to recall mandate and for leave to file motion for stay of mandate
	20	Order directing FCC to return mandate issued on Oct. 12, 1971 and directing Clerk to stay reissuance until Oct. 22, 1971
	21	Motion of FCC to further stay mandate to Nov. 22, 1971
	22	Certified copy of mandate issued on Oct. 12, 1971 returned by FCC
	22	Certified index to record returned by FCC
	22	Order denying further motion of FCC for stay of mandate
	26	Answer of Post-Newsweek in support of motion for stay of mandate
	29	Certified copy of opinion and judgment reissued to the FCC
Nov.	9	Order denying the motion of FCC to further stay mandate until Nov. 22, 1971
	12	Receipt dated Nov. 5, 1971 from the FCC for "Certified Index to the Record"

II

Docket Entries
in the
United States Court of Appeals (D.C. Cir.)
in
Business Executives' Move for Vietnam Peace
v. *Federal Communications Commission,*

No. 24,492

DOCKET ENTRIES

DATE		FILINGS-PROCEEDINGS
1970		
July	31	Petition of BEM for review of FCC inaction equivalent to an order denying relief
	31	Motion of BEM for temporary relief
	31	Motion of BEM to suspend rules and order immediate hearing
Aug.	3	Certified copies of petition for review mailed to FCC and to Attorney General by certified mail
	6	Response of FCC to motion for temporary relief
	7	Certified mail receipt returned from Attorney General
	12	Certified mail receipt returned from FCC
	25	Motion of BEM to file amended petition for review
Sept.	11	Order directing Clerk to file amended petition of BEM for review and extending time for filing of responses to Sept. 21, 1970
	11	Amended petition of BEM for review
	21	Opposition of FCC to motion for temporary relief
	23	Certified copy of amended petition for review mailed to FCC
	23	Certified copy of amended petition for review mailed to Attorney General by certified mail
	23	Motion of Post-Newsweek for leave to intervene
	23	Motion of Post-Newsweek for leave to file opposition to request for temporary relief by Sept. 24, 1970
	23	Order granting Post-Newsweek leave to intervene

DATE		FILINGS-PROCEEDINGS
1970		
Sept.	23	Order granting Post-Newsweek leave to file opposition to request for temporary relief by Sept. 24, 1970
	24	Objection of Post-Newsweek to request for temporary stay
	28	Reply of BEM to objection to motion for temporary relief
	29	Order denying motion of BEM for temporary relief and directing counsel to submit by Oct. 9, 1970 an agreement setting forth dates on which briefs and appendix will be filed
Oct.	20	Order directing time for filing briefs and allowing parties to proceed under Rule 30(c)
—	21	Certified index to record
Nov.	16	Motion of BEM for leave to file motion to extend time to file brief
	19	Order granting motion of BEM for leave to file motion to extend time to file brief and extending time to Nov. 23, 1970
	23	Brief for BEM
Dec.	16	Motion of BEM for leave to file amended brief
	16	Joint appendix to briefs
	18	Motion of FCC for leave to file for Post-Newsweek and FCC
	22	Order granting motion of FCC for leave to file motion to extend time to file brief and tending time to Dec. 30, 1970
	30	Brief for Post-Newsweek
	30	Brief for FCC

DATE		FILINGS-PROCEEDINGS
1971		
Jan.	8	Order granting motion for leave to file amended brief
	8	Brief for FCC
	13	Brief for Post-Newsweek
	13	Motion of BEM for leave to file reply brief
	14	Brief for FCC
	20	Order granting motion of BEM for leave to file reply briefs
	20	Reply brief for BEM
Mar.	9	Oral argument before Judges Wright, McGowan and Robinson
Aug.	3	Opinion of Court of Appeals by Judge Wright; dissenting opinion by Judge McGowan
	3	Judgment reversing and remanding to FCC
	11	Motion of FCC to extend time to file petition for rehearing to Aug. 31, 1971
	16	Opposition of BEM to motion to extend time to file petition for rehearing
	18	Opposition of DNC to motion to extend time to file petition for rehearing
	20	Motion of Post-Newsweek for leave to file petition for rehearing
	23	Response of BEM in opposition to motion for leave to file petition for rehearing
	27	Motion of ABC for leave to file petition for rehearing
	30	Order granting ABC leave to file petition for rehearing and to file suggestion for rehearing en banc and extending the time to file the petition for rehearing by the FCC to Aug. 31, 1971

DATE		FILINGS-PROCEEDINGS
1971		
Aug.	30	Petition of Post-Newsweek for rehearing and suggestion for rehearing en banc
	30	Petition of ABC for rehearing
	31	Petition of FCC for rehearing and suggestion for rehearing en banc
Oct.	4	Order denying petitions of FCC, ABC and Post-Newsweek for rehearing
	4	Letter to counsel that no judge requested a vote on suggestion for rehearing en banc and that no action will be taken on said petition
	12	Certified copy of opinion and judgment issued to the FCC
	14	Motion of FCC to recall mandate and for leave to file motion for stay of mandate
	20	Order directing FCC to return mandate issued on Oct. 12, 1971 and directing Clerk to stay reissuance until Oct. 22, 1971
	21	Motion of FCC to further stay mandate to Nov. 22, 1971
	22	Certified copy of mandate issued on October 12, 1971 returned by FCC
	22	Certified index to record returned by FCC
	22	Order denying further motion of FCC for stay of mandate
	26	Answer of Post-Newsweek in support of motion for stay of mandate
	29	Certified copy of opinion and judgment reissued to the FCC
Nov.	9	Order denying the motion of FCC to further stay the mandate until Nov. 22, 1971
	12	Receipt dated Nov. 12, 1971 from the FCC for the "Certified Index to the Record"

III

Relevant Pleadings Before and Orders of the Federal Communications Commission in *Democratic National Committee*, F.C.C. 70-861

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

IN RE DEMOCRATIC NATIONAL COMMITTEE,
Washington, D. C.

Request for Declaratory Ruling Concerning Access to Time on Broadcast Stations

To: The Commission.

REQUEST FOR DECLARATORY RULING

The Democratic National Committee (hereinafter called the DNC), by its counsel, pursuant to Section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e), and Section 1.2 of the Commission's regulations, requests that the Commission issue a declaratory ruling:

> That under the First Amendment to the Constitution and the Communications Act, a broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as the DNC, for the solicitation of funds and for comment on public issues. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

The DNC is willing to purchase time at regular commercial rates and is not at this time requesting a ruling that free time for the specified purposes must be made available to it.[1]

[1] On the other hand, the DNC believes that the networks and individual stations have a legal and moral responsibility to make significantly more free time available to responsible groups for public issue programming. In this connection it is important to note the enormous profitability of the broadcast industry, the unprecedented and unique impact of television on our society and the urgent problems of public policy that our nation now faces.

The DNC Requires Access to the Broadcast Media To Broaden Its Financial Base.

The DNC seeks this ruling for two interrelated purposes, which it believes are essential to the continuation and improvement of the nation's political system. In the words of the recently issued report of an expert and prestigious non-partisan Commission on campaign costs —the *Voters' Time* report—the DNC hereby seeks:

1. "To guarantee that there is basic access to the broadcast media for all significant candidates . . . ;" and

2. "To stimulate effective citizen participation in the processes of democratic government by encouraging small contributions to political campaigns." *Voters' Time, Report of the Twentieth Century Fund, Commission on Campaign Costs in the Electronic Era*, p. 17 (1969).[2]

The DNC incurred substantial financial obligations during the 1968 presidential campaign. The DNC has a pressing responsibility to eliminate this large indebtedness. An essential part of this effort is a widespread radio and television campaign through which political contributions will be solicited on a nationwide basis. In 1970 America, this is the only way the DNC can effectively reach large numbers of small contributors to the extent necessary to satisfy its indebtedness and to promote adequately its candidates and causes.

The DNC intends to request to purchase time on individual radio and television stations and on national networks. It anticipates that time will be requested both for the broadcast of specific programs of varying

[2] The members of the Commission were Newton N. Minow (who served as Chairman), Dean Burch, Thomas G. Corcoran, Alexander Heard and Robert Price.

durations and for spot announcements of varying durations. Some presentations—both programs and announcements—will be primarily (or solely) devoted to the solicitation of funds. Other presentations may contain comment on then-current controversial issues of public importance. For example, as part of this fund raising campaign, the DNC may wish to utilize broadcast time to offer what it considers to be viable alternatives to the policies of the present Republican Administration.

The dramatically soaring costs of conducting modern campaigns have dangerously increased the dependence of candidates and political parties upon large contributors:

—In 1956, a little over forty percent of all contributions by individuals to the Democratic Party exceeded $500. In 1968, almost eighty percent of all contributions by individuals to the Democratic Party exceeded $500.[3]

—The *Voters' Time* report points out that "between 1960 and 1964, the number of people who contributed $500 or more to national-level committees increased from about 4,000 to 6,700, and total receipts of both parties from this source increased from $5.6 million to $8.3 million."[4]

—The University of Michigan's highly respected Survey Research Center estimates that only six percent of the population made political contributions in 1968.

The DNC, like its counterpart in the Republican Party, is profoundly concerned as national candidates

[3] See Table 5, *Voters' Time, supra.*

[4] Id. at 45.

become more and more dependent on fewer and fewer contributors to whom they are forced to turn for higher and higher percentages of continually increasing campaign costs. As Leonard Hall, former Chairman of the Republican National Committee, said:

> "All of us engaged in political activity agree that every effort should be made to interest more and more individuals in political campaigns, and, in particular, to increase the number who provide financial support through their contribution. Every political leader is desirous of broadening the base of financial support. . . ." *Voters' Time, supra*, pp. 43-44.

A uniform conclusion of expert task forces and commissions that look at this problem is: the concentration of political contributions in relatively few hands presents clear and present dangers to the integrity of our political system. See *e.g.*, *Financing Presidential Campaigns, Report of the President's Commission on Campaign Costs*, p. 11 (1962); *Financing a Better Election System, Committee for Economic Development*, p. 51 (1968); *Voters' Time, supra*, p. 44 (1969).

First, such concentration may make certain candidates unduly obligated to a few special interest groups. See *Financing a Better Election System*, p. 51. *Second*, as the report of President Kennedy's Commission on Campaign Costs noted:

> "The heavy dependence of political parties in presidential campaigns upon substantial gifts from and expenditures by a relatively small number of individuals and organizations lends itself to wide-spread misinterpretations." At p. 11.

Third, it has been suggested that the erroneous impressions derived from undue concentration of political contributions may lead to a cynicism that could ultimately destroy democracy. *Voters' Time, supra*, at p. 44.

Television and radio—whose expense has been the major cause of this dangerous political situation—may also be its cure. Access to broadcast facilities is the most expensive and the most critical feature in the conduct of a present-day political campaign. In 1968, the total cost for political advertising on television and radio was approximately $90 million—or almost one-third of all money spent in political campaigning that year.[5] That $90 million is almost three times the $34 million federal budget for the Bureau of Narcotics and Dangerous Drugs; eighteen times the $5 million budget for the civil rights enforcement activities in the Department of Justice; and almost four times the $24.9 million budget of the Federal Communications Commission itself.[6] The astronomical expenditure of $90 million is a reflection of the reach and impact which political experts attribute to the broadcast media. See MacNeil, *The People Machine: The Influence of Television on American Politics* (1968); J. F. Kennedy, *A Force That Has Changed The Political scene, TV Guide*, Nov. 14, 1959.

A political organization seeking the attention and support of potential small contributors must have access to the broadcast media. Television, in particular, is unquestionably without peer in its ability to reach the nation. Television has brought the Vietnam war, racial strife and student disorder into every living room in America with consequences for our society we cannot yet fully perceive. It is only through this medium that an effective nationwide campaign such as the DNC proposes can be launched.

The importance of access to television—and the exposure which such access brings—was recently under-

[5] See Alexander and Myers, *A Financial Landslide for the GOP*, Fortune, March 1970, p. 104, 189.

[6] The Budget of the United States Government, Fiscal Year 1971.

scored by the Senate Committee on Commerce during its evaluation of amendments to the political broadcast provisions of section 315 of the Communications Act when it noted:

> "Television has become the most accepted medium of mass communication in the United States. Ninety-five percent of all American homes have television sets.
>
> "The air waves, especially those used for television, now play a dominant role in political campaigning. *During the 1968 presidential election campaign a candidate could with a single message lasting one minute, presented within one program, on one television network, reach as many as 23 million viewers of voting age—a number equal to almost a third of the votes cast in that election.* Prior to television, with the most intensive campaign, a candidate could have reached only a small fraction of that audience." S. Rep. No. 91-751 To Accompany S. 3637, 91st Cong., 2d Sess., March 25, 1970, p. 5.[7] (Emphasis supplied.)

The evidence demonstrates overwhelmingly that the use of the broadcast media is the most effective way to broaden the financial base of a political party.

One television appeal by then National Republican Committee Chairman Dean Burch, on October 19, 1964, produced what one Republican official termed "the most phenomenal outpouring" of financial political support in the history of this country. See *The Evening Star*, October 23, 1964. Within three days after this tele-

[7] The subsequent deliberations on S. 3637 on the Senate Floor contain repeated references to the critical importance of television and radio to political campaigning and deep concern of the Senate with the expense involved in obtaining adequate exposure through the use of broadcast media. See, *e.g.*, comments of Senator Pastore, 116 Cong. Rec. at S5634, April 13, 1970.

vision appeal, the Republican Party had received 70,000 letters and thirty-five hundred money orders. In all, it has been calculated that television appearances by Mr. Burch during the 1964 campaign harvested at least 100,000 contributions in amounts of less than $100. See Alexander and Myers, *The Switch in Campaign Giving*, *Fortune*, November 1965, p. 212.

Similarly, a handful of network television solicitations during September and October 1968 produced almost $800,000 in campaign funds for the Democratic nominee, Hubert H. Humphrey. These contributions, which were sent to a post office box number which was advertised *only* in those few television spots, averaged $10 apiece, and none exceeded $100.[8]

Therefore, the DNC has concluded that, if it is to achieve the broad financial base which it, as well as many respected commissions, believes to be essential to the integrity of this nation's political process, it must promptly launch a nationwide radio and television campaign of the type described.[9]

There is an Urgent Need for the Declaratory Ruling at an Early Time.

The DNC has several million dollars of debts which are long overdue. It has an urgent responsibility to satisfy these debts as promptly as possible. To develop

[8] We are informed that a recent television appeal by five United States Senators for funds to promote peace in Southeast Asia produced an estimated $100,000 in small contributions within the first two days after the telecast.

[9] Even with this campaign, it is the belief of the DNC Chairman that in the 1972 Presidential campaign, the Republican Party will have $50 million to spend, while the Democratic Party is likely to have only one-fifth of that amount or $10 million. *The New York Times*, March 29, 1970, p. 1. Without the successful implementation of the current campaign that disparity will only be increased.

and produce the materials to be used in the contemplated campaign will require the expenditure of thousands of dollars.[10] Indeed, the DNC is currently attempting to raise, independent of funds already dedicated, substantial sums to be used exclusively in the campaign. The DNC is most reluctant, particularly in view of its present financial condition, to undertake the expenditures necessary to the complete development of a successful campaign unless it can be certain that it will be able to obtain the access to the broadcast media which implementation of the plan demands. On the other hand, once the Commission gives it the assurances sought by this request, the DNC will forthwith begin to purchase time to carry out its plan.

The DNC, both over the years and in the preliminary planning of the present campaign, has had extensive dealings with broadcasters. The DNC's experiences in this area make it clear that it will encounter considerable difficulty—if not total frustration of its efforts—in carrying out its plans in the event the Comission should decline to issue a ruling as requested. By way of examples:

A. *The "Election Campaign" Policy.* The CBS television network quite recently flatly rejected a request by the DNC to *purchase* one-half hour of prime time. The DNC planned to present an issue-oriented program which would have included an appeal for contributions to the Party. CBS' position, as stated to representatives of the DNC, was that it would sell time for political purposes only during "election campaigns."

In reporting on this incident, *The New York Times* on March 22, 1970, quoted Richard W.

[10] The DNC obviously expects that the returns will justify the expense, otherwise it would not undertake the project at all.

Jencks, President of the CBS Broadcast Group, as saying that CBS' policies "do not permit the sale of time for presenting currently controversial points of view except during election campaigns."[11]

B. *The "Controversial Issue" Policy.* A common policy of broadcast stations is to refuse to sell announcement or program time for the broadcast of views on controversial issues of public importance. For example, the Post-Newsweek Stations in Washington, D. C.—WTOP-AM-FM-TV—have "long had a policy of not accepting spot announcements dealing with controversial issues, . . ." as reflected in a February 5, 1970 letter from Larry H. Israel, Chairman of the Board of the Stations, to William B. Ray of the Commission's Complaints and Compliance Division.[12] Indeed, the CBS Network policy is to this effect, as indicated above, although CBS may—it is not altogether clear—relax that policy during "election campaigns."

C. *The "Fund Solicitation" Policy.* Numerous stations have enunciated policies that neither spot announcements nor program time will be made available where the proposed user of the time intends to solicit funds, as would the DNC in this campaign. For example, the ABC Network and its owned and operated stations have a "general policy" against solicitations which can be, and is,

[11] The *Times* went on to attribute to Mr. Jencks statements about other groups—*i.e.*, supporters of the United Nations and opponents of ABM—which had recently been denied time on the basis of CBS' arbitrary policy.

[12] The Commission currently has before it a complaint by a businessmen's association against WTOP with respect to the station's policy. The instant DNC request for ruling, of course, involves much wider and more fundamental public interest considerations.

relaxed, with the company's approval.[13] What any such policy means in practice is that a station will permit its facilities to be used for solicitation by certain groups in certain circumstances.[14] Thus, stations carry public service announcements for favored groups as well as religious presentations which contain both direct and indirect appeals for funds. In fact, every commercial announcement, in the last analysis, is a solicitation for funds.

There may be still other "general policies" which would have applicability to the campaign. Certainly, the number of stations alone portends greater problems in this area than have already been encountered. In addition to the three national commercial networks, as of April 1, 1970, there were, on the air, 509 commercial VHF television stations, 180 commercial UHF stations, 4,280 standard broadcast stations, and 2,111 commercial FM stations. While several of these stations have common owners, it does not necessarily follow that every station owned by an individual or group would follow the same policies.

There are a variety of policies which any of these thousands of stations could follow to prevent the Democratic National Committee from carrying out its proposed campaign. One station might ban the campaign because it involves a solicitation of funds. Another, which permits solicitation of funds, might ban the campaign on the

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[13] *See*, for example, WBKB-TV, Chicago, Illinois, Renewal Application, File No. BRCT-21, dated August 30, 1967, Exhibit 5, § III, p. 2.

[14] The stations appear to make their exceptions in an arbitrary and capricious manner without any rational standard. We do not question the limitation of access to "responsible" groups. We do submit that under the "responsible" group de jure theory, the stations are de facto discriminatory in an unreasonable and improper way.

grounds that the proposed spot contained controversial material on a major political issue of the day. Still others might justify a ban on the ground that there was no election campaign (or no national election campaign) in process.

It is obvious that there must be a national, uniform communications policy with respect to the activities of a responsible group, such as the DNC, that would permit the kind of access through which funds could be solicited and the American people could be informed of divergent views on national issues. Without action by this Commission, there will be no such policy.

The DNC Has a Constitutional and Statutory Right to the Media Access It Now Seeks.

A broadcaster may not constitutionally adopt artificial and arbitrary barriers to access to its facilities by responsible groups. In its unanimous landmark decision, *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), the Supreme Court emphasized that it is the public's right to hear contrasting viewpoints which is protected by the First Amendment, not the broadcaster's freedom to present only those viewpoints which accord with his own. In this respect, the Court said:

> "This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in § 326, which forbids FCC interference with 'the right of free speech by means of radio communication.' Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and

purposes of the First Amendment. *It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.* See *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940); *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 361-62 (1955); 2 Z. Chafee, Government and Mass Communications 546 (1947). *It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. Associated Press* v. *United States*, 326 U.S. 1, 20 (1945); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). See Brannan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965). *It is the right of the public to receive suitable access to* social, *political*, esthetic, moral, *and other ideas and experiences which is crucial here.* That right may not constitutionally be abridged either by Congress or by the FCC." 395 U.S. at 389-90 (emphasis supplied).

The Court also employed language that would extend to members of the public the right of access to broadcast facilities. For example, the Court said:

> "By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Govern-

> ment from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." 395 U.S. at 389.

In a somewhat similar fashion, the Supreme Court added:

> "It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. The statute, long administrative practice, and cases are to this effect." 395 U.S. at 394.

This language of the Court should be contrasted with the assertion of Mr. Jencks—as reported in the March 22, 1970 edition of *The New York Times*—that CBS' policy has roots in his company's "belief that [its] news organization can give a fairer presentation" than others. As thus described by Mr. Jencks, the CBS policy explicity violates the constitutional standards set down by the Court in *Red Lion.*

The DNC submits that arbitrary barriers, contrary to the law as established in *Red Lion,* are erected to meaningful access when, for example, a national television network asserts that time for "political broadcasts" will be sold only during certain periods every other, or

every fourth, year. The DNC submits that arbitrary barriers, contrary to the law as established in *Red Lion*, are created when a local station pursues a policy of not selling spot or program time to responsible parties who wish to comment on controversial issues of public importance.[15] Finally, in this regard, the DNC submits that arbitrary and capricious barriers, contrary to the law as established in *Red Lion*, are created when a broadcaster proffers, as a reason for refusing to sell time to a responsible group, a policy that it will not permit the solicitation of funds over its facilities. These are, however, precisely the types of policies which the DNC now faces in its effort to carry out a meaningful fund-raising campaign.[16]

The DNC does not contend, and it need not contend, that broadcasters are precluded from establishing reasonable restrictions regarding the use by others of the facilities for which they hold licenses. Broadcasters can, for example, limit the use of facilities to presentations by *responsible* spokesmen. Similarly, even where responsible spokesmen are to appear, broadcasters can adopt and implement whatever procedures may be needed to ensure that the use of facilities, for example, is in good taste or does not result in the presentation of slanderous material.

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[15] The DNC submits that this is so under *Red Lion* whether a station argues that it has literally adhered to the terms of the fairness doctrine either because of the "balance" which it has achieved or because of the innocuous nature of the material which the broadcaster permits to be transmitted over the facilities to which its license pertains.

[16] On May 15, 1970, the Commission gave notice of the institution of proceedings looking to the adoption of rules, implementing *Red Lion*, which would require broadcasters, in certain situations to open up their stations to others. This is what the DNC here seeks, but in a broader context than that proceeding appears to encompass.

On the other hand, in considering what restrictions are reasonable in this area, the broadcaster and the Commission must remain mindful of the importance of broadcast media to anyone desiring to make an effective nationwide presentation. And, of course, the pronouncements by the Supreme Court in *Red Lion*—based on the public's rights under the First Amendment—would preclude the adoption of fixed and inviolate policies of the types with which the DNC is now faced.

There is a critical question of public policy, as well as constitutional law, involved here: Are the public airwaves—the most powerful communications media in our democracy—to be used to solicit funds for soap, brassieres, deodorants and mouthwashes and not to solicit funds to enhance the exchange of ideas?

The Commission is accordingly requested to rule—in order to remove a substantial uncertainty—that for a broadcaster to refuse to sell time to responsible entities, such as the DNC, for the solicitation of funds and for comment on public issues, because of the broadcaster's "general policies" against selling time for such purposes, violates the First Amendment of the Constitution of the United States and the Communications Act.

The "Public Interest" Standards of the Communications Act Are Violated by the "General Polices" Here Involved.

Should the Commission decline to issue this ruling, a refusal of a broadcaster to sell time to the DNC should nevertheless be evaluated by the Commission in a manner adverse to the broadcaster in its consideration of the renewal application. The Commission is, thus, alternatively, requested to so rule.

Some of the public interest considerations surrounding the present proposal of the DNC have been enumerated

above. The United States Supreme Court has had occasion to address itself to the importance of the broadcast media to political expression:

> "Recognizing radio's potential importance as a medium of communication of political ideas, Congress sought to foster its broadest possible utilization by encouraging broadcasting stations to make their facilities available to candidates for office without discrimination, and by insuring that these candidates when broadcasting were not to be hampered by censorship of the issues they could discuss. Thus, expressly applying this country's tradition of free expression to the field of radio broadcasting, Congress has from the first emphatically forbidden the Commission to exercise any power of censorship over radio communication. It is in line with this same tradition that the individual licensee has consistently been denied 'power of censorship' in the vital area of political broadcasts." *Farmers Ed. & Coop. Union v. WDAY*, 360 U.S. 525, 529-30 (1959).

The Commission has frequently had occasion to comment upon the public interest considerations inherent in a broadcaster's making time available for political broadcasts. Indeed, in the *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 20 P & F Radio Reg. 1901 (1960), the Commission included political broadcasts as among the "major elements necessary to meet the public interest, needs and desires" of a station's community.

The Commission has found, moreover, in situations where no violation of section 315 of the Communications Act had occurred, that the imposition of artificial restrictions, in terms of allotted time, for the use of facilities by political candidates, was contrary to the public interest. The Commission expressed particular concern with judgments as to the amounts of time to be made

available which were "arbitrarily determined in advance" of an election and which bore no relationship to the importance of the election to which the arbitrary limitations applied. *Homer P. Rainey*, 3 P & F Radio Reg. 737 (1947).

Also pertinent are the Commission's determinations, in the context of comparative broadcast proceedings, that a licensee's practice in refusing, *inter alia*, to carry political broadcasts involving local and state political offices are indicative of a tendency to disregard local programming needs. *City of Jacksonville*, 12 P & F Radio Reg. 113, 180j (1956); see also *Loyola University*, 12 P & F Radio Reg. 1017, 1099 (1956).

Instructive as well is the following discussion in the Commission's ruling on the question of whether bipartisan spot announcements soliciting funds for political parties would be subject to the fairness doctrine:

> "In conclusion, we think two other observations are in order. First, we recognize that the announcements described by you constitute an effort to achieve the worthwhile and commendable goal of broadening the base of political contributions. The importance of this effort was recently emphasized when, on May 29, 1962, President Kennedy transmitted to the President of the Senate and the Speaker of the House of Representatives legislation designed to carry out five of the important recommendations contained in the 'Report on the President's Commission on Campaign Costs.' In his letter of transmittal, the President stated, among other things:
>
> > 'In these days when the public interest demands basic decision so essential to our security and survival, public policy should enable presidential candidates to free themselves of dependence on large contributions of those with special interests. Accordingly, it is essential to broaden

the base of financial support for candidates and parties. To accomplish this, improvement of public understanding of campaign finance, coupled with a system of incentives for solicitation and giving, is necessary.'

"Furthermore, your proposal has an objective, in common with the broad policy underlying the 'fairness doctrine'—the right of the public in a free society to be fully informed as to controversial issues of public importance, including those involving political parties and candidates. See paragraph 6 of enclosed Editorializing Report.

"Second, the question whether to present such announcements is one for the licensee, who is faced with many competing requests to allocate time for public service announcements. The Commission of course expresses no opinion as to how that time should be allocated. But the announcements in question should not be rejected upon the sole ground that the licensee would have to be fair in their presentation." *Lawrence M. C. Smith*, 25 P & F Radio Reg. 291, at 293 (1963).

The DNC is mindful of the provisions of sections 3(i)[17] and 326 of the Communications Act and of rulings, such as that issued by the Commission in its November 22, 1965 letter to the Women's Washington Strike for Peace, to the effect that:

"With respect to the refusal of the station to sell time for spot announcements, under the Communications Act, the selection and presentation of broadcast material are the responsibilities of the individ-

[17] Section 3(i) is intended, we submit, simply to exempt broadcasters from the panoply of common carrier regulation provided for in Title II of the Communications Act. It should not be permitted as a defense to a challenge to a broadcaster that its policies restricting access to the licensed facilities by others are contrary to the public interest.

ual station licensees, and Section 326 of the Act expressly prohibits the exercise of censorship powers by the Commission. . . ."

The response to those matters insofar as they pertain to this request is that they all predate the *Red Lion* decision. The Commission's regulation of broadcast station programming has undergone rapid development over the past few years which culminated in the *Red Lion* decision. It is now clear that in the field of broadcasting it is principally the public and not the broadcaster which the First Amendment is designed to protect.

Moreover, it is not necessary for the Commission to rule that a broadcaster must present programs or announcements of any particular nature proffered by any particular concern. The Commission must rule, however, that to establish arbitrary barriers to access on the part of responsible groups, such as the DNC, is contrary to the First Amendment and to the Communications Act as construed in *Red Lion*, or, in the alternative, that such barriers—in the case of the DNC's present campaign or in general—are, per se, contrary to the public interest.

CONCLUSION

To insure the basic access to the broadcast media guaranteed by the First Amendment to the Constitution and the Communications Act, and to enable the political parties of this country to broaden significantly their financial base, the Commission is hereby respectfully urged to issue as promptly as possible a declaratory ruling, providing that:

a. A broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as the DNC, for the solicitation of funds and for comment on public issues; or, alternatively,

b. Any such "general policy" will be taken into consideration—in a manner adverse to the broadcaster—by the Commission in evaluating whether the grant of a broadcaster's renewal application accords with the public interest.

Respectfully submitted,

DEMOCRATIC NATIONAL COMMITTEE

By /s/ Joseph A. Califano, Jr.
JOSEPH A. CALIFANO, JR.
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
General Counsel

Of Counsel:

David H. Lloyd
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

May 19, 1970

[Certificate of Service Omitted in Printing]

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

May 22, 1970

In Reply Refer to:
8330
C5-1344

American Broadcasting Company, Inc.
1330 Avenue of the Americas
New York, New York 10019

Gentlemen:

The Commission has received a "Request for Declaratory Ruling Concerning Access to Time on Broadcast Stations" from the Democratic National Committee, a copy of which was served upon you by the Committee.

The Committee requests that the Commission rule that "a broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as the DNC, for the solicitation of funds and for comment on public issues" or, alternatively, that such a general policy "will be taken into consideration—in a manner adverse to the broadcaster—by the Commission in evaluating whether the grant of a broadcaster's renewal application accords with the public interest."

On page 13 of its Request, the Committee refers to the American Broadcasting Company's policies in this area.

In order that it may be more fully informed, the Commission requests that you submit your comments upon the particular reference to ABC, and any other comments which you may wish to submit regarding the Request for Declaratory Ruling.

Please submit your comment within twenty days of the date of this letter.

Sincerely yours,

/s/ William B. Ray
WILLIAM B. RAY, Chief
Complaints and Compliance Division
for Chief, Broadcast Bureau

cc: Robert Kaufman, Esq.
Alfred Beckman, Esq.
Joseph A. Califano, Jr., Esq.

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

May 22, 1970

In Reply Refer to:
8330
C5-1344

Columbia Broadcasting System, Inc.
51 West 52nd Street
New York, New York 10019

Gentlemen:

The Commission has received a "Request for Declaratory Ruling Concerning Access to Time on Broadcast Stations" from the Democratic National Committee, a copy of which was served upon you by the Committee.

The Committee requests that the Commission rule that "a broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as the DNC, for the solicitation of funds and for comment on public issues" or, alternatively, that such a general policy "will be taken into consideration—in a manner adverse to the broadcaster—by the Commission in evaluating whether the grant of a broadcaster's renewal application accords with the interest."

On pages 11, 12 and 17 of its Request, the Committee refers to the Columbia Broadcasting System's policies in this area.

In order that it may be more fully informed, the Commission requests that you submit your comments upon the particular references to CBS and any other comments which you may wish to submit regarding the Request for Declaratory Ruling.

Please submit your comments within twenty days of the date of this letter.

Sincerely yours,

/s/ William B. Ray
WILLIAM B. RAY, Chief
Complaints and Compliance Division
for Chief, Broadcast Bureau

cc: Joseph DeFranco, Esq.
Joseph A. Califano, Jr., Esq.

COMMUNICATIONS WORKERS OF AMERICA

[CWA Emblem]
(Affiliated with AFL-CIO)
1925 K Street, N.W.
WASHINGTON, D. C. 20006
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JOSEPH A. BEIRNE, *President*

May 27, 1970

The Honorable Dean Burch, Chairman
Federal Communications Commission
Washington, D. C.

My dear Mr. Chairman:

This is in support of the request for Declaratory Ruling, filed May 19, 1970, with the Commission by the Democratic National Committee through its General Counsel, Joseph A. Califano, Jr.

It is a travesty that the broadcasting stations and networks have refused the reasonable request of the DNC for the purchase of broadcast time at standard rates. The wrong is compounded by the necessity for the DNC to pray to the Commission for relief.

The broadcasters' action to deny is contradictory to the precedents of the last six years. In 1964, the Republican National Committee purchased broadcast time to make a nationwide solicitation for political campaign funds. The Republican group did in fact receive money as a direct result of the solicitation. The broadcasters who accepted the Republican purchase of time would distort reality were they to contend that they had no means

of knowing that a funds solicitation was to be carried on the airwaves.

In 1968, the Democratic National Committee used broadcast media for funds, again with the full knowledge of the broadcasters.

The broadcasters' contention that political broadcasting will be accepted only in "political campaign" periods is specious, inasmuch as the broadcasters themselves have in effect taken it upon themselves to determine the campaign period. The Party or candidate involved should be the one who determines when the campaign opens. Political campaigns have been in progress in every month of the year.

The Communications Act and the Rules of the Commission which flow therefrom impose positive duties on broadcasters to serve their communities, one means of which is in the public affairs field. Political issues, by their very nature controversial, fall within the public affairs category.

The broadcasters also are attempting to deny the use of the airwaves on the grounds that the DNC will enter into a controversial area, in connection with the funds solicitation. This is unquestionably true. However, the broadcasters as policy accept paid advertising for funds solicitations of other non-profit organizations throughout the Nation; in many communities, the programs being supported by such organizations are quite controversial.

The report of the Twentieth Century Fund, "Voters' Time," brilliantly expressed the need for both Parties to "stimulate effective citizen participation in the processes of democratic government by encouraging small contributions to political campaigns." The two Parties require more and more contributions from ordinary citizens in order to remain responsible instruments of public policy.

It would be entirely wrong for the Parties to become the chosen instruments of special interest donors of large amounts.

I should hope that the Commission will act quickly to resolve the questions raised by the Democratic National Committee, and direct the broadcasters to make the broadcast facilities available. Since there are sufficient recent precedents, this issue appears uncomplicated. The broadcasters must be informed once again that they do not own the airwaves, but merely are the fiduciaries, to whom certain duties pertain.

Sincerely yours,

/s/ J. A. Beirne
JOSEPH A. BEIRNE
President

AMERICAN BROADCASTING COMPANIES, INC.
1330 Avenue of the Americas • New York, N. Y. 10019

LT 1-7777

EVERETT H. ERLICK
Group Vice President and General Counsel

June 10, 1970

Mr. William B. Ray, Chief
Complaints and Compliance Division
Federal Communications Commission
Washington, D. C. 20554

Your Reference 8330
C5-1344

Dear Mr. Ray:

By letter to American Broadcasting Companies, Inc. ("ABC") dated May 22, 1970, you stated that the Commission had received a "Request for Declaratory Ruling Concerning Access to Time on Broadcast Stations" from the Democratic National Committee ("DNC"). In that pleading DNC requested a ruling that "a broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as the DNC, for the solicitation of funds and for comment on public issues." You requested ABC to comment in particular on an allegation in said pleading (p. 13) that the ABC network and its owned and operated stations have a "general policy" against solicitations, "which can be, and is, relaxed, with the company's approval."

DNC's citation is to a portion of ABC's Standards and Policies, on file with the Commission (e.g. BAL-5733, Exhibit I-3, Attachment B, Section III), dealing with "Appeals for Charity." That provision, not here applicable, states (p. 2):

> ABC reserves the right to determine which appeals (for charity) may be made over its facilities. No direct solicitation of funds may be made without specific permission of ABC. The client is required to consult with ABC before arranging to include *appeals for charity* in any program.[1]

ABC's Standards elsewhere provide (p. 4):

> Discussion of political or controversial issues may not be included by sponsors in their *regularly scheduled programs advertising goods and services*, except when, in the opinion of ABC, it does not contravene the public interest.

Elsewhere ABC's Standards restrict as follows the solicitation of funds on *religious* broadcasts (p. 26):

> Solicitation of funds will be permitted on religious broadcasts to the extent that the following announcement may precede or follow the program proper: 'You are invited to send your free will gifts and offerings for the support of this program to (name of program, box number, city and state).'
>
> Religious sponsors may not ask the public to buy their publications.

Equally pertinent to DNC's pleading are the following provisions in ABC's Standards dealing with "Political Programs" (pp. 27-28):

> Effective with the opening of a local, state or national campaign as determined on the basis of the appropriate election laws, ABC will sell time for political programs to legally qualified candidates, their duly authorized representatives, or their *political organizations* which show substantial evidence of

[1] Emphasis supplied throughout this letter.

their activity in the campaign such as through public participation. . . .

In addition, ABC will sell time for political programs *prior to the official opening of a campaign* and starting on a date to be determined by the American Broadcasting Company, to individuals and *organizations.* ABC reserves the right to decide whether such individuals or organizations seeking to purchase precampaign time for political programs are duly qualified to discuss and have a recognized interest in the forthcoming campaign.

Also directly in point, with respect to DNC's pleading of May 19, 1970, are the following excerpts from ABC's current Standards and Policies dealing with "Controversial Issue Programming":

> The Company recognizes its responsibility in the public interest to safeguard and promote opportunity for the free discussion of controversial issues of general concern to the American people. It has and will continue to use its facilities for the presentation of the views of responsible individuals and organizations within controversial issue programs to the fullest extent consistent with the fair balance of opinion and maintenance of a sound program structure.
>
> Whenever ABC permits its facilities to be used for the presentation of one viewpoint on a controversial issue of public importance, it will afford reasonable opportunity for the presentation of contrasting views. Balance need not be achieved on the same program, but when considered on an overall basis, ABC's programming will present the contrasting viewpoints on controversial public issues.

ABC will determine what subjects are of such interest or importance as to warrant time for their presentation. ABC will also decide whether it will present a contrasting viewpoint itself, or if not, which individuals or organizations seeking time are best qualified to discuss a subject chosen for broadcast treatment or are most representative of a viewpoint selected for presentation.

Comment on or discussion of current or proposed legislation or pending litigation will be permitted only on political, news, news commentary, discussion and controversial issue programs. Comment on or discussion of pending litigation must be within the bounds of fair comment in order not to prejudice the outcome.

Absent special public interest considerations, ABC will not sell time for controversial issue programs or announcements or permit the solicitation of funds or the sale of publications on controversial issue broadcasts.

In short, absent special public interest considerations, ABC will not sell time for comment on controversial issues or for solicitation of funds.

ABC offers the following additional comments on the Request for Declaratory Ruling:

The continued strength and viability of our two party system are of vital importance. ABC has emphasized in recent Congressional hearings the importance of a wider base for political contributions—small sums from millions of Americans rather than large contributions from a few.

Of course, there are many controversial public issues and dozens of responsible organizations advocating all

shades of opinion on such issues. Were we to open the door entirely to any "responsible entity" who wished to purchase time for programs or announcements in which to espouse its point of view on controversial issues of public importance and/or to solicit funds, we think it reasonable to anticipate a flood of such requests. The obvious problems would be, in each instance, compliance with the "Fairness Doctrine" and where to draw the line.

Because the strength and viability of the major political parties are vitally important, ABC would be prepared, consistent with its other obligations, to accept such orders for time from major political parties as can be accommodated on a reasonable basis. At the same time, we propose to continue our general policy against the sale of time for controversial issue programs and announcements and solicitations for funds, absent special public interest considerations.

As a licensee, and as a responsible member of the community, ABC submits that the foregoing policies, so long as they are reasonably applied, are entirely appropriate. In its Declaratory Ruling, or by separate letter, the Commission may wish to address itself to ABC's proposed treatment of the issue.

Respectfully submitted,

/s/ Everett H. Erlick
EVERETT H. ERLICK

NATIONAL BROADCASTING COMPANY, INC.
1725 K Street, N.W., Washington, D. C., EMerson 2-4000

June 22, 1970

Howard Monderer
Washington Attorney

Hilburt Slosberg, Esq.
Office of General Counsel
Federal Communications Commission
Washington, D. C. 20554

Dear Mr. Slosberg:

Pursuant to your request for a statement on the subject, NBC has no policy which prevents it from accepting an order for program time from a major national political party during non-campaign periods for the purpose of presenting the views of the party on important public issues. We would permit a solicitation of funds for the party in such a program.

Several months ago, in discussions with a representative of the Democratic National Committee, NBC offered to make available for purchase by the Committee a prime time period on the NBC Television Network for a program of this type. NBC was subsequently advised that the Committee did not wish to proceed with the purchase.

Respectfully yours,

/s/ Howard Monderer
HOWARD MONDERER

CBS
Columbia Broadcasting System, Inc.
51 West 52 Street
New York, New York 10010
(212) 765-4321

Robert V. Evans
Vice President and General Counsel

June 22, 1970

Mr. William B. Ray, Chief
Complaints and Compliance Division
Federal Communications Commission
1919 "M" Street, N. W.
Washington, D. C. 20036

Re: Commission Reference 8330
C5-1344

Dear Mr. Ray:

This is in response to your May 22 letter requesting the comments of the Columbia Broadcasting System, Inc. on the "Democratic National Committee Request for Declaratory Ruling Concerning Access to Time on Broadcast Stations" (hereinafter "DNC Request"). The DNC asks the Commission to rule:

> ". . . that 'a broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as the DNC, for the solicitation of funds and for comment on public issues' or, alternatively, that such a general policy 'will be taken into consideration—in a manner adverse to the broadcaster—by the Commission in evaluating whether the grant of a broadcaster's renewal application accords with the interest.'"

CBS welcomes this opportunity to comment on the DNC Request. The DNC Request poses a fundamental chal-

lenge to the ability of a broadcast licensee to establish and follow general policies best articulated in the licensee's judgment to insure that controversial issues are covered fully and fairly. The DNC Request also calls into question long standing FCC regulatory policy in this important area. In essence, the DNC now requests, without any allegation or showing of inadequate coverage, that this Commission repudiate the regulatory philosophy it enunciated in adopting the Fairness Doctrine, *In the Matter of Editorializing by Broadcast Licensees*, and has since consistently reiterated:

> "It is apparent that our system of broadcasting, under which private persons and organizations are licensed to provide broadcasting service to the various communities and regions, imposes responsibility in the selection and presentation of radio program material upon such licensees. Congress has recognized that the requests for radio time may far exceed the amount of time reasonably available for distribution by broadcasters. It provided, therefore, in § 3(h) of the Communications Act that a person engaged in radio broadcasting shall not be deemed a common carrier. It is the licensee, therefore, who must determine what percentage of the limited broadcast day should appropriately be devoted to news and discussion or consideration of public issues, rather than to the other legitimate services of radio broadcasting, and who must select or be responsible for the selection of the particular news items to be reported or the particular local, state, national or international issues or questions of public interest to be considered, as well as the person or persons to comment or analyze the news or to discuss or debate the issues chosen as topics for radio consideration." 13 F.C.C. 1246, 1247, 25 R.R. 1901, 1903 (1949).

We endeavor in these comments to show that CBS's present method of handling controversial issues serves the public interest in obtaining full, fair and informative discussion, and that there is no need for a new compulsory carriage rule that would unbalance programming and have a host of other undesirable effects. We further demonstrate that there is no statutory or constitutional right to the relief requested by the DNC. To the contrary, the rule would contravene the statutory policy set forth in Sections 3(h) and 326 of the Communications Act.

I. The DNC Has Misunderstood CBS Policies Relating To The Presentation Of Controversial Issues. CBS Policies Insure Full And Fair Presentation Of Controversial Issues.

The DNC Request has incorrectly described CBS policies (pages 11, 12 and 17 of the DNC Request). We, therefore, outline those policies and the reasons for their adoption.

Central to CBS policies relating to the coverage of news and the expression of viewpoints on controversial issues is a fundamental commitment to objectivity in reporting the news and a recognition that the public can make informed judgments only if it is regularly exposed to the vigorous clash of viewpoints on the major issues of the day. CBS has consistently sought to maintain a fair and balanced treatment of these issues in its news and informational broadcasts.[1] In furtherance of these goals, CBS has long maintained policies which in general provide that broadcasts dealing with current controversial issues be produced under the supervision and control of CBS

[1] Indeed, we do not understand the DNC Request to question CBS' performance with respect to objective and fair coverage of issues.

News or a CBS Owned station. Only by lodging these responsibilities with our own personnel can we effectively insure that objectivity and fairness will actually be achieved. This commitment to fairness is also the basis of the long standing CBS policy not to sell time for the expression of viewpoints on public issues (except for political broadcasts as discussed below), but rather to provide significant opportunities for such discussion without charge to partisans of various viewpoints in our news and information broadcasts. In adopting this policy we concluded that we could not provide coverage of significant issues with fairness and balance if partisans with strong financial resources could preempt our facilities to present their viewpoints on issues they select. A policy of selling time to partisans would in our view necessarily distort the manner in which issues were presented to the listening and viewing public. CBS has concluded that as a licensee in a medium with a finite amount of time to provide news, information and entertainment, we best serve the public by presenting issues and viewpoints within a balanced program schedule utilizing newsworthiness as the sole criterion.[2]

CBS has built one of the world's great news organizations, with a well-deserved reputation for fairness and objectivity. CBS News and the CBS Owned stations provide regularly-scheduled hard news broadcasts. These broadcasts regularly include so-called "mini-documentaries", as well as investigative reports, sometimes in two, three or four-part series. In addition, CBS also provides regularly-scheduled weekly news interviews such as FACE THE NATION and WCBS-TV's NEWS-

[2] The problem would be exacerbated by the so-called "prime time access" rule adopted by the Commission in Docket No. 12782 which would have the effect of limiting each network's prime time (7-11 p.m.) schedule to three hours each evening with only a limited exemption for news and public affairs broadcasts.

MAKERS, numerous documentaries and special news broadcasts. Thus, for example, in the years 1968 and 1969 there were 84 CBS News special broadcasts and 28 60 MINUTES broadcasts—all in prime time. Important subjects are also dealt with on the CBS News religious programs, LOOK UP AND LIVE and LAMP UNTO MY FEET.

In the past decade the CBS News operation has grown significantly. Consider the following comparisons between the two-year period, 1968-1969, and the two-year period, 1956-1957:

—Total hours of news and public affairs broadcasting: 1,354 vs. 675—more than twice as much.

—Total prime time hours of news and public affairs broadcasting: 192 vs. 34—about six times as much.

—Total hours of regularly-scheduled hard news broadcasts, 6 p.m. - 11 p.m.: 338 vs. 130—over two and one-half times as much.

—Total hours of documentaries: 100 (all in prime time) vs. 37 (six in prime time).

In quality as well as quantity, CBS has served the public increasingly well under its policy of professional responsibility for coverage of controversial issues. In 1968, CBS News special broadcasts dealt with the issues that were being debated by all Americans, including, for example, such broadcasts as Walter Cronkite's "Report From Vietnam"; Charles Collingswood's on-the-scene "Report From Hanoi"; and "Cuba: Ten Years of Castro". There was a documentary entitled "Marijuana"; one on the plight of the American Indian entitled "The Forgotten American"; and a report on civil disorders that asked "What Happened to the Riot Report?". There was a broadcast on hucksterism in American politics, "Cam-

paign American Style"; the hard-hitting report, "Hunger In America", which led to public outcry and Congressional investigation; and the now classic seven-part series, "Of Black America". 1969 reports included documentaries on coal-mining accidents and the struggle in the United Mineworkers Union, a three-part series on the generation gap, and a report on the college turmoil. There was "Triangle of Conflict: China, Russia and the U.S." and a probing documentary on the ABM controversy.

Viewers of 60 MINUTES during the years 1968 and 1969 heard Ramsey Clark discuss policemen, saw a two-part treatment of germ and gas warfare, saw a report on racial discrimination in Great Britain, a discussion of the Pope and the pill, a report on homosexual assaults in America's prisons, a report on U.S. draft evaders in Canada, and parallel reports from both sides of the Biafran-Nigerian war, the Irish civil war and the Arab-Israeli conflict.[3]

In addition, the CBS MORNING NEWS WITH JOSEPH BENTI regularly includes interviews with government

[3] To demonstrate how fully and fairly issues are reported to the public by CBS News, we have prepared as an Exhibit to these comments a summary of that coverage on one major public issue of the day—the Indochina War and the domestic reaction to it. This exhibit examines one CBS News hard news broadcast series, THE CBS EVENING NEWS for a three-month period. We note, too, that similar coverage of the issues was presented by the CBS MORNING NEWS and other CBS hard news broadcasts. In addition, (for a period of approximately six months) it examines other CBS News television broadcasts such as documentaries, specials, and news-interview broadcasts.

Each CBS Owned television station has, of course, supplemented the national coverage in its own local news broadcasts. Also, attached as an Exhibit is a summary of the WCBS-TV coverage of this issue, again including one local hard-news broadcast series, the WCBS-TV 6:00 O'CLOCK REPORT (for a period of three months), and other WCBS-TV news broadcasts as well as WCBS-TV Editorials and Replies to those Editorials (for a period of approximately six months).

leaders and other important public figures. This discussion format in recent months has afforded such prominent Democrats as Senators Birch Bayh, Frank Church, J. William Fulbright, Gale McGee, George McGovern, Walter Mondale, and Edmund Muskie, and Congressmen George Mahon, Morris Udall, and Lester Wolff an opportunity to express their viewpoints on the controversial issues of the day.

The CBS policy of professional news responsibility does not, of course, mean that the actors in the events of the day are themselves prevented from speaking directly to the viewing public. The output of CBS News contains a high proportion of direct presentations of views by individuals—both on our regular "hard" news programs and our news interview programs such as FACE THE NATION. Indeed, television news generally achieves proportionately more direct quotation from a news subject's own lips, and less paraphrasing in the words of reporters, than any other news medium.

CBS provides a very substantial degree of direct exposure for partisans on controversial issues—always, however, through formats that are journalistically well-suited to provide a full and fair elucidation of the issues. After President Nixon's April 30 address on Cambodia, CBS News broadcast on May 3 a special report, "Where We Stand In Cambodia". In addition to news reports from Cambodia and analyses of developments by CBS News correspondents, this broadcast also presented the comments of such national leaders as Secretary of State Rogers, retired General Maxwell Taylor, retired General James Gavin, and Senators Hugh Scott, Fred Harris, John Stennis, George Aiken, William Fulbright and Mark Hatfield. On May 9, 1970 CBS News presented a special, "The Colleges, Cambodia, and the Confrontation in Washington", which included, among others, the views of Dr. Spock, Dr. Moos and Coretta King on the domestic reac-

tion to the conflict in Cambodia. On June 5, 1970, two days after President Nixon's most recent address on Cambodia, CBS News presented a live debate, "The Senate and the War", moderated by Eric Sevareid, on which six U.S. Senators debated the Indochina situation—three supporting the President and three opposing him.

Still another format was utilized by CBS News on the May 10, 1970 broadcast, "Campuses in Crisis: Three College Presidents Speak". In this news special CBS correspondent Harry Reasoner of CBS discussed unrest on college campuses, and its relationship to the war, with the presidents of the University of Michigan, Notre Dame University, and Yale University.

Nonetheless, these direct appearances remain part of our own basic effort to inform fully and fairly; they are not permitted to become the instrument of partisan advocacy. The Report of The Twentieth Century Fund Commission on Campaign Costs in the Electronic Era, heavily relied on by the DNC, aptly describes the dangers in the political sphere of substituting partisan program control for professional news responsibility:

> "Advances in broadcasting technology have made it possible to present a candidate in the best possible light, with all inept answers to hard questions edited out of the tape, with false starts and all uncertainties and human failings eliminated, all warts and blemishes removed, a single smooth image alone remaining. It is no criticism of television or radio to say that some day it may be possible to offer a wholly plausible and wholly false impression of a candidate. Broadcasting would become an impenetrable shield for a candidate, would not open a window on him through which the public could see him clearly." [4]

[4] Twentieth Century Fund, *Voters' Time*, p. 37 (New York; 1969).

These admonitions apply as much to a political party as to a political candidate. In programs prepared by CBS News, the hard questions are pressed, not ducked, and human failings are exposed, not edited out.

We agree that the First Amendment is concerned primarily with the right of the public to be informed—and it is our commitment to that ideal which has led us to adopt policies considered "arbitrary" by the DNC. Our fundamental conviction that the public can most effectively be informed through the journalistic judgments of the media was discussed by Richard W. Jencks, President, CBS/Broadcast Group in an August 11, 1969 address before the American Bar Association on the role of the press today:

> "An organ of information does not exist to serve the unrestrained freedom of speech of individual members of its public, or even of its own editorial staff; still less does it exist to be a therapeutic outlet for the frustrated. The collection and dissemination of news is and must be a professional and group effort, and its function is to serve the need of the public to be informed. Freedom of the press presupposes the opportunity of an organ of information to attempt to provide for the reader, listener or viewer—out of the welter of events and impressions which make up the daily quota of happenings—some sensemaking whole. Learned Hand once described this function in these words:
>
> > 'News is history; recent history, it is true, but veritable history, nevertheless; and history is not total recall, but a deliberate pruning of, and culling from, the flux of events. Were it possible by some magic telepathy to reproduce an occasion in all its particularity, all reproductions would be interchangeable; the public could have no choice, provided that the process should be

> mechanically perfect. But there is no such magic; and if there were, its result would be immeasurably wearisome and utterly fatuous.'
>
> "It is the function thus described that demands the intervention or professional journalists between the event and the public; it is this function which militates against the concept of news organizations as common carriers of other people's views, with no control over content."

These comments cannot present a full-length portrait of the growth and accomplishments of CBS news operations. But even this sketch should demonstrate the basic wisdom of this policy and the folly of replacing it, as the DNC Request would have this Commission do, with a governmentally imposed requirement to sell program time for discussion of issues to all comers (except, apparently, those in the vague and undefined category of the "irresponsible").

While CBS policy provides that the presentation of controversial issues be undertaken in news and informational broadcasts, the prohibition against the sale of time does not apply to broadcasts on behalf of political candidates or in connection with ballot propositions.

In exempting the sale of time to political candidates from our general policies, we recognize that the basic purpose of Section 315 of the Communications Act was to facilitate discussion of political issues by legally qualified candidates.

CBS places no limitations (except with respect to defamation and obscenity in non-315 appearances) on the use of paid political broadcast time. Paid political broadcasts may present material on any current local or national controversial issue—so long as the broadcast is on behalf of a candidate or a group of candidates. Because

ballot propositions are so involved in the electoral process and indeed in the campaigns of many candidates we made a similar exception for them in our policies.

The CBS 1968 STATEMENT OF POLICY ON POLITICAL BROADCASTS (a copy of which was furnished to both Democratic and Republican National Committees, as well as other state and local political committees in 1968) makes clear that:

> "A paid political broadcast may contain a direct appeal for funds provided it is clear that CBS is not to be involved in any way in the collection or handling of such funds." (page 17)

Indeed, the DNC Request specifically takes note of the fact that in both the 1964 and 1968 national campaigns, the major political parties made successful use of national television in the solicitation of campaign funds. To a large extent, existing CBS policies recognize the needs expressed by the Democratic Request that:

> "A political organization seeking the attention and support of potential small contributors must have access to the broadcast media."

In this spirit, CBS/Broadcast Group President, Richard W. Jencks, recently testified in support of S. 3637, to repeal Section 315 (a) as to Presidential and Vice-Presidential candidates and to reduce the cost of political campaign broadcasts.

Consistently with CBS's long standing recognition of the importance of adequate public financial support of political parties, and with direct relevance to the matters raised by the DNC Request, CBS will permit the purchase by political parties of a special category of spot announcements (i.e. up to one minute in length) for the purpose of political fund-raising. These announcements need not be on behalf of candidates or ballot propositions.

II. A Regulatory Policy Which Imposes Common Carrier Obligations on Broadcasters Would Be Contrary To The Public Interest.

CBS news policies have (1) prevented the distortion that would occur if coverage of an issue were dependent upon its financial support rather than upon its newsworthiness, (2) fostered the development of one of the world's great news organizations, and (3) provided the public with extensive coverage of controversial issues of all kinds, including a very substantial degree of direct exposure for partisans on controversial issues, to a greater extent than most other broadcast or print media.

If CBS were compelled to sell program time to partisans on the haphazard basis suggested by the DNC, the balance in programming that CBS has assiduously maintained would be jeopardized. The indulgence and interest of the viewing public are by no means unlimited. If broadcasters must sell program time to partisans, they will have correspondingly less time for other news, sports, and entertainment programs. And each broadcaster's ability to provide a fair presentation of public issues in his overall broadcast schedule will be adversely affected.

It is hard to think of a proposal more mischievous in its consequences to the public's right to learn and know.

Fair and balanced coverage of controversial issues could never emerge from an auction in which the highest bidders determined what issues to discuss and how they should be presented. Yet that is exactly the direction in which the DNC proposal would take us.

If broadcasters were compelled to sell time to "responsible entities" wishing to comment on public issues, would the public be more fairly informed about the plight of the American Indian or racism in America, about gun control or the ABM controversy, about coal-mining accidents

or air pollution? Or would the disparate financial resources of the persons interested in issues like these irreparably unbalance and distort coverage?

There are significant production costs involved in creating interesting, persuasive television broadcasts. Would it then be the responsibility of the broadcasters themselves to produce and air the material that would restore the balance—and, if so, how are top-flight professional journalists to be interested in devoting their careers to a journalism whose content is to be determined by the currency of other people's propaganda? If there are more bidders than time available, how would the networks choose among bidders, and could the Commission avoid the dangerous role of umpire reviewing the decisions made?

We appreciate that political campaigns are costly and increasingly difficult to finance. We also recognize that there is a relation between dollars spent and success or failure in an election. However, the issue in this proceeding is not a short-term problem of the DNC—its debt and the 1970 election. At stake is something more fundamental—the danger of replacing rational political discussion with one-sided presentations designed to persuade rather than to inform. Indeed, *Voters Time*, extensively cited by the DNC, cautions that:

> ". . . the democratic process requires open forums for political ideas and the widest possible dissemination of information. Letting ability to pay determine access to the great audience and fostering the development of commercial-like campaign spots rather than rational political discussions may in time subvert the democratic process."

We agree.

If the concept were adopted, what limits, if any, could a licensee apply to those seeking to purchase time? The

DNC request would rule out "arbitrary barriers" to access on the part of "responsible" groups, such as the DNC. From the requests received to purchase time on various public issues, on what basis would the licensee determine the issues and the group to be afforded access? Must the licensee, for example, sell time in 1970 to a group opposing fluoridation of water, or is that issue too remote and unimportant today? Should it strive for balance in selling time to opposing viewpoints or should it simply sell available time to the highest bidder so long as he is "responsible"? What is the scope of the licensee's discretion in determining the indicia of "responsibility"?[5] And what are the licensee's obligations if the proponents of a question wish to buy time and the opposing groups wish time, but do not have funds?[6] Is it likely that grappling with these unsolvable problems will result in the public being better informed than if broadcasters continue to have the non-delegable responsibility for full and fair coverage of controversial issues?

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[5] We can not conceive of any one desiring to purchase time who would admit to the label "irresponsible."

[6] Or the related case of groups that actually have funds but wish to expend those funds in other media. Indeed, just such a situation developed in connection with the 1967 New York State ballot issue regarding the adoption of a new New York State Constitution. In that election, groups favoring the adoption of a new State Constitution purchased spot announcements on New York City television stations. A number of groups opposed to the adoption of the new Constitution requested that the Commission issue a fairness doctrine ruling which would compel licensees carrying paid announcements in favor of the Constitution to give free time to those opposing the new Constitution. While the Commission, for procedural reasons, did not reach this issue, we believe it significant to note that several of the groups who requested this FCC ruling were conducting active advertising campaigns in New York City newspapers voicing their opposition to the adoption of the new Constitution.

Ultimately, of course, even the DNC's "common carrier" proposal requires that there be some gatekeeper to determine who will be heard, who is "responsible" and who is not, which responsible group should be sold a segment of time when not enough of this scarce resource is available for all and how much time should be sold to other partisans in the light of other program needs? Will the gatekeeper continue to be the licensee, or does the DNC contemplate that the Commission will fulfill that role through a continuing process of interpreting and elaborating the DNC rule? The DNC Request does not say, but it is obvious that the result will be to put the Commission in the business of making specific programming decisions for which the licensee is now responsible.

The DNC rule would significantly divest the licensee of responsibility for controversial issue programming and in so doing it would necessarily place that responsibility upon the Commission if a "chaotic" situation were to be avoided.[7] Our whole tradition of press freedom from undue governmental interference cries out against such a result. The DNC, concerned with its own present difficulties, has lost sight of the vital democratic principles underlying Professor Zechariah Chafee's trenchant warning:

> "Whenever anybody is inclined to look to the government for help in making the mass media do what we desire of them, he had better ask himself one antiseptic question: 'Am I envisaging myself as the official who is going to administer the policy which seems to me so good?' Justice Holmes remarked that, when socialism came, he hoped he would be 'on the committee.' You and I are not going to be on the committee which is charged with making newspapers

[7] FCC letter to Representative Ottinger, discussed in Section III below, 18 RR 2d 1031 (1970).

or radio scripts better written and more accurate and impartial. It is very easy to assume that splendid fellows in our crowd will be exercising the large powers over the flow of facts and opinions which seem to us essential to save society, but that is an iridescent dream. We must be prepared to take our chances with the kind of politicians we particularly dislike, because that is what we may get." Chafee, *Government and Mass Communications* Vol. II, p. 709.

III. There Is No Constitutional Or Statutory Right To Compel Broadcasters To Carry The DNC's Programs. To The Contrary, The Communications Act Bars The Commission From Imposing Any Such Obligation. The Commission Has Consistently Declared That There Is No Right Of Compulsory Carriage.

The constitutional and statutory arguments of the DNC, like its policy arguments, are without merit. The DNC contention is not that CBS has failed to present adequate and fair coverage of public issues, but that "responsible entities" have a "right" to purchase time for the purpose of presenting programs of their own to express views and solicit funds for carrying out political or other objectives. It suggests—mistakenly—that the "right" it asserts derives from both the Constitution and the Communications Act. As we now show, the claim is supported neither by the Constitution nor the statute, and as the Commission has consistently recognized, it is specifically barred from creating such a right.

A. There Is No Constitutional Right To Compel Carriage Of Programs On Broadcast Stations.

The DNC's suggestion that there is a First Amendment right to purchase time is insupportable. Broadcasters,

though licensed by the Commission and subject to its valid regulations, are not publicly-owned facilities, and there is no First Amendment right to purchase time on radio or television stations. This question has been settled ever since *McIntire* v. *William Penn Broadcasting Co.*, 151 F. 2d 597 (3rd Cir. 1945), *cert. denied*, 327 U.S. 779 (1946). There clergymen and religious corporations brought suit to compel a radio station to sell time to them for the broadcast of certain programs. The court denied relief, holding that plaintiffs had no First Amendment right to purchase time on the station. It stated

> "there is no reason, the FCC permitting and no violation of the anti-trust laws being involved, why the defendant may not sell time to whomever it pleases. As we have stated, Congress had confided the selection of program material to be broadcast to the taste and discrimination of the broadcasting stations.
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> True, if a man is to speak or preach he must have some place from which to do it. This does not mean, however, that he may seize a particular radio station for his forum. . . . 'Unlike other modes of expression radio inherently is not available to all.'
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> * * * *
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> "a radio broadcasting station is not a public utility in the sense that it must permit broadcasting by whoever comes to its microphones." *Id* at 600-01.

Accord, *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F. 2d 497, 501 (1st Cir. 1950). Similarly, in *Avins* v. *Rutgers*, 385 F. 2d 151 (3rd Cir. 1967), *cert. denied*, 390 U.S. 920 (1968), the plaintiff brought suit against the State University of New Jersey, asserting that the State University law review had violated the First Amendment by rejecting an article he

had submitted, allegedly because of its "conservative" content. The court rejected this contention, relying on the *McIntire* case.[8] There is nothing in *Red Lion Broadcasting Co.* v. *FCC* 395 U.S. 367 (1969) that indicates that *McIntire* is not good law or suggests that, apart from Section 315, there is any legal obligation for broadcast licensees to sell time. To the contrary, as we discuss below, *Red Lion* sustained long standing Commission policies that are wholly inconsistent with the right asserted here by the DNC.

Moreover, the rule proposed by the DNC would inevitably lead the Commission into the realm of censorship by requiring it to regulate broadcast access and to decide which groups were sufficiently "responsible" to merit exposure in this medium and which programs it should compel broadcasters to carry. Governmental "dictation as to what should go into particular programs" or what groups are to be heard is the very heart of censorship. Chafee, *Government and Mass Communications*, p. 641 (1965). See *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951).

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[8] The district court held: "It could not be contended reasonably that the Editorial Board of Rutgers Law Review must accept for publication every treatise on law which is submitted to it. There must necessarily be a broad area for the exercise of discretion." Quoted at 385 F. 2d at 152. The court of appeals affirmed, holding (p. 153-154): "The right to freedom of speech does not open every avenue to one who desires to use a particular outlet for expression. . . . [t]he acceptance or rejection of articles submitted for publication in a law school law review necessarily involves the exercise of editorial judgment and this is no wise lessened by the fact that the law review is supported, at least in part by the State."

B. There Is No Statutory Right To Compel Carriage Of Programs On Broadcast Stations. A Commission Rule Compelling The Broadcast Of Any Program Supplied By A "Responsible Group" Would Violate The Communications Act.

The DNC claims that as a "responsible entity" it also has a statutory right to purchase time on broadcast stations. This claim has no better legal ground. Like the constitutional claim, it was explicitly rejected in the *Massachusetts Universalist* and *McIntire* cases.[9]

Moreover, for this Commission to compel carriage of the Democratic National Committee's programs would plainly violate the Communications Act. Section 3(h), 47 U.S.C. Section 3(h), explicitly states that broadcasters are not common carriers, and it explicitly bars the Commission from imposing a common carrier obligation on broadcasters. This section, together with Section 326, 47 U.S.C. Section 326, establishes that the licensee—and not the Commission—is to exercise the power of program selection.[10] See 1960 *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 25 Fed. Reg. 7291, 7294 (August 3, 1960).

Nothing in the Act or the Commission's rules is to the contrary. Proceeding from Section 315 are limited and carefully circumscribed personal rights of reply to material previously selected for broadcast by the licensee: (i) equal opportunities for political candidates; (ii) replies

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[9] Thus, for example, in *McIntire* (p. 600) the court stated: "the plaintiffs have cited no specific provisions of the Federal Communications Act which has been violated by the defendant and we can find none.

[10] Contrary to the assertion (p. 22 fn. 1) in the DNC request, as we show, Section 3(h) does far more than exempt broadcasters from Title II of the Communications Act.

to personal attacks; and (iii) replies to station political endorsements.

If a licensee affords broadcast time to a political candidate, the opponents of that candidate must be given equal opportunities. And under the Commission's rules, *if* a station broadcasts a personal attack or makes a political endorsement, a reply must be afforded. Except in these limited instances, the licensee has full responsibility as to source and content of his programs.[11]

The Congress' decision not to make the broacaster a common carrier, and its decision to make the licensee responsible for program selection, were advertent and deliberate. As the legislative history of the Act and its interpretation by the courts and the Commission show, this Congressional policy is central to the regulatory scheme.

In its consideration of the Radio Act of 1927, Congress faced and rejected the notion that broadcasters should be charged with a common carrier responsibility. The bill, as reported by the Senate committee, contained a common carrier provision.[12] This provision was ultimately re-

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[11] To be sure, the balanced programming required by the fairness doctrine requires stations to carry appropriate opposing views. But it leaves the licensee the widest discretion as to source and manner of presentation of the views. No person or group is given the right to compel carriage of its program.

[12] "If any licensee shall permit a broadcasting station to be used. . . . [to broadcast any matter for a valuable consideration], or by a candidate or candidates for any public office, or for the discussion of any question affecting the public, he shall make no discrimination as to the use of such broadcasting station, and with respect to said matters the licensee shall be deemed a common carrier in interstate commerce: Provided, that such licensee shall have no power to censor the material broadcast." S. Rep. No. 772, 69th Cong., 1st Sess. (1926), p. 4; 67 Cong. Rec. 12503 (1926).

The "common carrier" language, the requirement of "nondiscrimination" and the references to broadcasting matter for a valuable consideration and "the discussion of any question affecting

vised (creating what became Section 315) so that instead of requiring broadcast access on a common carrier basis, it merely afforded reply opportunities limited to political candidates. Senator Dill reasoned that common carrier obligations would hamper the broadcaster who would then be compelled to "accept anything and everything that was offered him so long as the price was paid." (67 Cong. Rec. 12502 (1926)). Similarly, Senator Dill opposed the provision because he feared that if discretion were taken away in this area, broadcasters:

> would have to give all their time to that kind of discussion, or no public question could be discussed. 67 Cong. Rec. 12504 (1926).[13]

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the public" were deleted on the floor of the Senate, through an amendment offered by Senator Dill (67 Cong. Rec. 12501-12502 (1926)).

[13] Senator Howell objected to the change because "to perpetuate in the hands of a comparatively few interests the opportunity of reaching the public by radio and allowing them alone to determine what the public shall and shall not hear is a tremendously dangerous course for Congress to pursue." (67 Cong. Rec. 12503 (1926)).

Senator Dill responded, "I sympathize with a great deal of what the Senator is saying, but I want to remind the Senator of the danger of having the words 'public questions' in the bill.

"That is such a general term that there is probably no question of any interest whatsoever that could be discussed but that the other side of it could demand time; and thus a radio station would be placed in the position that the Senator from Iowa mentions about candidates, namely, as that they would have to give all their time to that kind of discussion, or no public question could be discussed.

"As I say, I sympathize with the Senator's position; but the opposition to that was so strong in the minds of many that it seemed to me wise not to put it in the bill at this time, but to await developments, and get this organization to functioning, and the bill can be amended in the future.

"I just wanted to leave that idea with the Senator as to my reasons for taking the view I do." (67 Cong. Rec. 12504) (1926).

Debate on the conference report reaffirmed the judgments reached in the earlier debate that it would be unwise to enact a common carrier obligation.[14]

The 1927 Congress did not stop at rejecting common carrier status for licencees. It also adopted what is now Section 326 of the Communications Act. The legislative history demonstrates that by this action Congress intended to bar the Commission from abridging the right of the licensee to choose the programs that it will carry.

Even before Congress began consideration of the bill, a proposal was initially rejected that would have permitted the agency to establish a system of priorities for the selection of program material by broadcasters under which, for instance, religious or educational programs would have preference over entertainment programs.[15] When the bill which became the 1927 Act was introduced in 1926, this provision was deleted, according to Representative White—the author of the bill— because "of the fear which had been expressed by so many to me that that did confer something akin to censorship." [16] This pro-

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[14] 68 Cong. Rec. 2567 (1927). The 1927 Act did contain a provision, dropped without comment from the 1934 Act, permitting license revocation if the Interstate Commerce Commission found that a particular licensee had been guilty of discrimination with respect to charges or service. *Compare* 44 Stat. 1162, 1168, *with* 48 Stat. 1064. However, it was understood that the I.C.C. would have to find that broadcasters were "common carriers," within the meaning of the Interstate Commerce Act, and that the I.C.C. had not previously asserted that such entities were common carriers within that Act. See 67 Cong. Rec. 5559 (1926); 68 Cong. Rec. 2567 (1927).

[15] A bill authorizing the licensing authority to "prescribe. . . the priorities as to subject matter to be observed" by classes of stations and stations within classes had originally been introduced by Representative White in 1924. H.R. 7357, 68th Cong., 1st Sess. (1924).

[16] *Hearings on H. R. 5589 Before the House Committee on the Merchant Marine and Fisheries*, 69th Cong., 1st Sess. (1926).

vision having been deleted, Representative White was satisfied that the bill as it passed the House did not permit censorship, even though it contained no specific anti-censorship provision.[17]

The Senate, however, was not satisfied with an unwritten proscription. The bill as introduced in the Senate[18] contained a specific provision—which later became Section 326—barring Commission censorship. And Senator Dill, the Senate sponsor, responded to a suggestion on the floor that the bill would permit censorship by stating that the "bill does not give to the Commission the power to censor programs, but instead there is a provision in the bill which specifically prohibits the commission from censoring programs in any way."[19]

Following adoption of the 1927 Act, in 1929, the Radio Commission, in a major pronouncement on the scope of the 1927 Act and its views on its own responsibilities, rejected, as had Congress two years before, the view that broadcasters must allow access to all who seek it. It was contended that the broadcasters' obligations, like those of telephone common carriers, ran to "the sender" of messages. The Commission held, however, that "the duties of broadcasting stations are to listeners." *Great Lakes Broadcasting Co.* v. *Federal Radio Commission*, 3 F.R.C. Ann. Rep. 32, 33.

The efforts to enact a right of access were not over, however. For example, in 1934 Congressman McFadden, seeking to achieve by legislation a right substantially identical to that which the DNC seeks here in its request for a declaratory ruling, sought to forbid discrimination by any broadcasting stations against programs sponsored

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[17] 67 Cong. Rec. 5480 (1926).

[18] S. 1754, 69th Cong., 1st Sess. (1926).

[19] 67 Cong. Rec. 12615 (1926).

by any religious, charitable or educational association. H.R. 7986, 73rd Cong., 2nd Sess. (1934). The Commission opposed the McFadden bill. Chairman Sykes, testifying against the bill, began his statement by pointing out that the proposal to require access

> "is directly contrary to broadcasting as it has grown up in the United States prior to the act of 1927 and is directly contrary to the theory of broadcasting under the act under which we operate . . . ."

The Chairman also stated that the Act

> *"puts upon the individual licensee of a broadcast station the private initiative to see that those programs that he broadcasts are in the public interest* . . . . Then that act makes those individual licensees responsible to the licensing authority to see that their operations are in the public interest." *Hearings on H.R. 8301 Before the House Committee On Interstate and Foreign Commerce*, 73rd Cong., 2nd Sess. (1934), pp. 349-52.

The McFadden bill was not reported out of committee, but Chairman Sykes' testimony opposing it became—at his request—part of the record of the Congressional consideration of the Communications Act of 1934. Section 3(h) of that Act was adopted specifically declaring that broadcasters are not common carriers. Passage of this provision—based as it was on the history of the 1927 Act, the Commission's views in the *Great Lakes* case and its Chairman's testimony on the McFadden bill—constitutes a clear legislative determination that it is not in the public interest to compel carriage of programs, without licensee selection as to content.[20] To the contrary, with

[20] Other attempts to add a common carrier provision were made both before and after consideration of the 1934 Act. All of them failed. *E.g.*, H.R. 14467, 70th Cong., 2nd Sess. (1928); H.R. 6227, 73rd Cong., 2nd Sess. (1934); H.R. 3716, 79th Cong., 1st Sess. (1945).

the exceptions noted earlier, the Act and its legislative history established that "the choice of programs rests with broadcasting stations licensed by the F.C.C." *McIntire, supra,* at 599. See also *F.C.C.* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 475 (1940); *Pulitzer Publishing Co.* v. *F.C.C.,* 68 App. D.C. 124, 126, 94 F.2d 249, 251 (1937).

Other legislative history shows that the general rule against compulsory carriage has particular force in the present case. First, in rejecting over the years numerous proposals to expand the equal time concept beyond candidate appearances, Congress has recognized the importance of the exercise of journalistic standards and licensee discretion in broadcasting news. In amending Section 315 of the Communications Act in 1959, Congress provided that even the equal time provision of Section 315 for political candidates would be inapplicable to certain categories of news broadcasts—an amendment which represented an increased Congressional recognition for the need of journalistic discretion in broadcasting news. In connection with the fairness provision of the 1959 amendment Congress had the benefit of the Commission's comments on proposed bills before House and Senate Committees which took the position that "when it comes to application of the overall fairness standard, the licensee can exercise discretion as to which viewpoints are entitled to be expressed and which spokesmen are entitled to be heard . . . ."[21] In the course of the floor debates on the "fairness amendment" to the bill, it was made clear

[21] See the Commission's official comments on proposed bills appearing in *Hearings on S. 1585, S. 1604, S. 1858 and S. 1929 Before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce,* 86th Cong., 1st Sess. (1959) p. 71 and in *Hearings on H.R. 5389, H.R. 5675, H.R. 6326, H.R. 7122, H.R. 7180, H.R. 7206, H.R. 7602 and H.R. 7985 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce,* 86th Cong., 1st Sess. (1959), p. 10.

that, as the fairness requirement was understood, it imposed only a general obligation on broadcasters to exercise their programming judgment in good faith, and was not a back door method of depriving broadcasters of discretion.[22]

Second, the relief which the DNC seeks relates to political campaigns and would, in effect, amount to an extension of Section 315 of the Act. Over the years, Congress has carefully limited Section 315 and has rejected amendments which would have extended the equal opportunities provisions of Section 315 to spokesmen for candidates and other election issues.[23] When consideration

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[22] 105 Cong. Rec. 14457 (1959) (remarks of Senators Pastore, Proxmire and Hartke); 105 Cong. Rec. 16231 (1959) (comments of Chairman Harris in response to Congressman Jones of Missouri); 105 Cong. Rec. 16227 (1959) (comments of Congressman Celler).

[23] S. 6. 71st Cong., 1st Sess. (1929) (equal opportunities for candidates, their spokesmen and political parties); H.R. 5716, 71st Cong., 2nd Sess. (1929) (similar); S. 1806, 77th Cong., 1st Sess. (1941) (equal opportunities must be afforded opposing parties when public officials discuss public questions); S. 814, 78th Cong., 1st Sess. (1943) (similar); H.R. 3595, 80th Cong., 1st Sess. (1947) (equal opportunities required for candidates, their spokesmen, political parties, when referendum questions are discussed, and for the discussion of differing viewpoints on public questions); S. 1333, 80th Cong., 1st Sess. (1947) (similar); H.R. 6949, 81st Cong., 2nd Sess. (1950) (equal opportunities for candidates, their spokesmen, or when referendum questions are discussed), H.R. 5470, 82nd Cong., 1st Sess. (1951) (equal opportunities required for candidates or their spokesmen), S. 1379, 82nd Cong., 1st Sess. (1951) (similar), H.R. 7062, 82nd, 2nd Sess. (1952) (similar); S.R. 539, 82nd, 2nd Sess. (1952) (similar); H.R. 11851, 87th Cong., 2nd Sess. (1962) (opportunities for response required when an individual is subjected to fidicule by a candidate utilizing time pursuant to Section 315); H.R. 7072, 88th Cong. 1st Sess. (1963) (equal opportunities to be afforded opponents when station editorializing favoring one candidate or opposing his opponent) H.R. 7612, 88th Cong. 1st Sess. (1963) (similar to H.R. 11851, 87th Cong. 2nd Sess.) H.R. 10135, 88th Cong. 2nd Sess. (1964) (similar to H.R. 7072, 88th Cong., 1st Sess.) H.R. 5414, 89th Cong. 1st Sess. (1965) (similar to H.R. 11851, 87th 2nd Sess.)

has been given to broadening the provisions of Section 315, Congress has made it clear that Congress itself retains responsibility. In connection with the 1959 amendments to Section 315, Congress specifically stated that it intended to continue supervision of the equal opportunities area:

> "The Congress declares its intention to reexamine from time to time the amendment to Section 315(a) of the Communications Act of 1934 made by the first section of this Act, to ascertain whether such amendment has proved to be effective and practicable. (73 Stat. 557 (1959))."

C. The Commission Has Consistently Declared That There Is No Right To Compulsory Carriage.

The DNC Request is also fundamentally inconsistent with the concept of licensee responsibility which has long been a root of this Comission's regulatory policy, as exemplified by its *1949 Editorializing Report*, 13 F.C.C. 1246, and its *1960 Report and Statement of Policy in the En Banc Programming Inquiry*, 25 Fed. Reg. 7291 (August 3, 1960). Thus, in a basic enunciation of its fairness doctrine, the Commission wrote in the *Report on Editorializing*:

> "It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view." 13 F.C.C. at 1251. See also the material quoted above, p. 2.

This was the philosophy too of the Commission in the *1960 En Banc Programing Report:*

> "An examination of the foregoing authorities serves to explain why the day-to-day operation of a broadcast station is primarily the responsibility of the individual station licensee. Indeed, Congress provided in Section 3(h) of the Communications Act that a person engaged in radio broadcasting shall not be deemed a common carrier. Hence, the Commission in administering the Act and the courts in interpreting it have consistently maintained that responsibility for the selection and presentation of broadcast material ultimately devolves upon the individual station licensee, and that the fulfillment of the public interest requires the free exercise of his independent judgment.
>
> * * * *
>
> "Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities. This duty is personal to the licensee and may not be delegated. He is obligated to bring his positive responsibility affirmatively to bear upon all who have a hand in providing broadcast matter for transmission through his facilities so as to assure the discharge of his duty to provide acceptable program schedule consonant with operating in the public interest in his community."

Moreover, the very issue presented by the DNC Request was the subject of a complaint to the Commission in 1965 by the Washington Women's Strike for Peace involving a policing of Station WTOP in Washington apparently similar to that complained of in the DNC Request. The group had complained about the station's refusal to sell its spot announcements on the subject of the Vietnam war and alleged that such denial violated the First Amendment and in any case was "contrary to policies of this Commission."

After noting that "it is not the policy of the licensee to sell spot announcements concerning controversial public issues, but rather, when they are of sufficient interest, the licensee deals with them in news and public affairs programs," the Commission wrote:

> "With respect to the refusal of the station to sell time for spot announcements, under the Communications Act, the selection and presentation of broadcast material are the responsibilities of the individual station licensees, and Section 326 of the Act expressly prohibits the exercise of censorship powers by the Commission. That Section provides . . . .
>
> "Thus, the Act makes it clear that the Commission has no power to require a broadcaster to carry or refrain from carrying any particular program, or to prescribe the content of any program presented over the air. Moreover, Section 3(h) of the Act provides that '. . . a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.' In *McIntire* v. *Wm. Penn. Broadcasting Company*, 151 F. 2d 597, the U.S. Court of Appeals, Third Circuit, stated, in part, that:
>
> > 'For a radio station to refuse to sell time in which an individual may broadcast his views may be censorship but we know of no law which prohibits such a course. As we have indicated, a radio broadcasting station is not a public utility in the sense that it must permit broadcasting by whoever comes to its microphone.'
>
> "In view of the foregoing, it does not appear that Commission action concerning radio station WTOP is warranted in this instance."

Although the DNC is "mindful of the provisions of Sections 3(i) [sic] and 326 of the Communications Act and of rulings [such as the Women's Strike letter]," the

(DNC Request, p. 22), these statutory sections and rulings are dismissed with the remarkable assertion: "The response to these matters insofar as they pertain to this request is that they all predate the *Red Lion* decision." (DNC Request, p. 23). Not so easily dismissed, however, is the Comission's decision of March 24, 1970, which involved the question of compulsory carriage in connection with the right of the ABC Television Network to delete certain remarks made by Judy Collins on The Dick Cavett Show. In that ruling, it is clear that the Commission continues to recognize (after *Red Lion*) that the licensee has considerable discretion in fulfilling the obligations of the fairness doctrine, including the selection of issues, formats, and the appropriate spokesmen. Thus, the Commission stated in its Judy Collins letter:

> "Except for broadcasts by legally qualified candidates for public office, where the licensee is enjoined from censoring, the licensee is responsible for all material broadcast over his facilities, and thus can and does edit and select the material to be presented. Each licensee makes thousands of programming decisions a year—that some material "works," some does not fit in a particular program, etc.
>
> "That the material in question involves discussion of a controversial issue does not take it outside the scope of the licensee's editing and selection process. The licensee must devote a reasonable amount of time to the discussion of controversial issues of public importance, and cannot exclude from the airways views with which he disagrees. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949). As the Supreme Court stated in *Red Lion*, the licensee must . . . conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be

barred from the airways. But he is not a common carrier (see Section 3(h) of the Communications Act) and can exercise judgment as to appropriate spokesmen, time, or manner of presentation of the issue.

"This last point is, of course, crucial. A person or group cannot demand that as a matter of right its message be presented over the station's facilities. *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F. 2d 597 (3rd Cir. 1945). The licensee does not have to present programming material which he believes either will not serve the needs or interests of his listeners or will not do so as well as other programming material. *Report and Statement of Policy Re: Programming Inquiry*, 20 Pike & Fischer, Radio Regulations, 1902, 25 F.R. 7291. He is thus constantly called upon to make choices between types of programming, and then, within each type, to choose the format and person to appear. If the licensee were deemed to be a common carrier, having to present any matter brought to him which was not obscene, etc., the result would be not only chaotic but a wholly different broadcasting system which Congress has not chosen to adopt."

Furthermore, in considering the DNC's contention that the Commission's fairness policies and rulings which predate *Red Lion* are no longer of decisional significance, it should be emphasized that the very first paragraph of the Court's opinion in *Red Lion* states:

> "The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine, which originated very early in the history of broadcasting and has maintained its present outlines for some

time. It is an obligation whose content has been defined in a long series of FCC rulings in particular cases, and which is distinct from the statutory requirement of § 315 of the Communications Act that equal time be allotted all qualified candidates for public office." 395 U.S. at 369-70. [Footnote omitted.]

Similarly, the current viability of the Commission's fairness policies and rulings was explicitly confirmed by the Court's description of the 1959 Congressional action amending Section 315 of the Communications Act as a ratification of long standing FCC administrative construction of the fairness obligations.

Thus the DNC is clearly wrong in asserting that the Court in *Red Lion* contemplated the abandonment of traditional FCC fairness policies and the adoption by the FCC of a common carrier theory as set forth in the DNC Request. To the contrary, the decision ratified long-standing FCC policies in this area.

IV. CONCLUSION

CBS intends to continue to promote robust and rational discussions of issues of public importance with the widest possible dissemination of facts and contrasting opinions. As a member of the "most powerful communication media in our democracy" we understand our obligations to the public and reject the notion that the ability to pay should be a factor in the exchange of ideas on controversial public issues. We disagree that anyone with a viewpoint and a dollar in hand ought to be able to purchase broadcast time to propagandize a particular view. Stripped of all its rhetoric, that is the thrust of the DNC's Request.

CBS submits that its policy and practice insure comprehensive coverage of controversial issues—with ample op-

portunity for a full and fair discussion of a cross section of opinion. The central guiding force in our various news formats is not ratings or cost, but is the appreciation that the public has a right to know—to be informed of the news of the day—that somehow through the sifting and winnowing of fact and opinion, truth will emerge and citizens will be better able to exercise their responsibilities.

At times our news broadcasts are unpopular and criticized, but as Dr. Frank Stanton, President, CBS, recently stated:

> ". . . the fact is that tranquility is not the order of the day. Ours is a questioning, searching society—unsure, groping, running to extremes, abrasive, often violent even in its reactions to the violence of others. Time-honored traditions are being rent asunder, and almost all elements of our society are involved in one way or another. It is the duty of the media to report all this as faithfully as humanly possible—not to hide it from view or to sugar-coat the facts."

This is our call to action, a mandate that has always guided CBS, and that is fully consistent with the Commission's goals.

We therefore believe that the Commission should decline to make the ruling requested by the DNC.

Respectfully submitted,

/s/ Robert V. Evans

Wilmer, Cutler & Pickering
of Counsel

Attachments

CBS NEWS EXHIBIT

ANALYSIS OF CBS EVENING NEWS COVERAGE OF INDOCHINA WAR AND DOMESTIC REACTION IN THE MONTHS OF MARCH, APRIL, AND MAY 1970

	Mins:Secs
Sunday, March 1, 1970	
Mudd: Enemy mortars hit Luang Prabang, Laos. B-52s hit Ho Trail.	00:44
Shepard & Threlkeld: Report from Queson Valley, So. Vietnam, where six marines are accused of murdering civilians at Son Trang or Thanh Tra.	02:45
Appearing: Lt. Col. Charles Cooper, SOF,* "Civilians had attacked troops in past."	01:30
Monday, March 2, 1970	
Cronkite: Antiwar movement leaders suggest following letter of law, burying Selective Service in paper.	00:20
Cronkite: Sen. Mansfield again criticizes US in Laos.	00:22
Cronkite: Report No. Vietnamese may boycott Paris Peace talks.	00:19
Cronkite: Most of 43,000 marines in Vietnam to be withdrawn by mid-July.	00:15
Cronkite: Guerrillas blow up bridge on Highway One in Vietnam.	00:16
Cronkite: Tran Ngoc Chau's re-trial begins in Saigon.	00:24

* SOF—Sound Appearances on Newsfilm.

Mins:Secs

Monday, March 2, 1970 (Continued)

Benti: Report on dismal understaffing in Veterans Hospitals, low quality care given to Vietnam vets. 04:48

Appearing: Patient Matthew Raible, Dr. Albert Tomasulo, VA's Donald Johnson, Rep. Olin Teague, Patients Robert Muller, Patrick Sheehan, Ron Kovic.

Tuesday, March 3, 1970

Mudd: Administration to release transcript of Senate hearings on Laos. 01:33

Appearing: Melvin Laird, SOF, "No buildup in Laos." 00:24

Sen. McGovern, SOF, "Laird misleading—special forces in Laos." 00:48

Cronkite: Laotian premier and military high command in emergency meeting in Vientiane. 00:15

Cronkite: So. Vietnam troops claim they killed 323 enemy in Mekong Delta in three-week operation. 00:12

Cronkite: Americans find huge enemy cache of rice near Cambodia. 00:12

Sargent: Survivors of Tet offensive in Hue have memorial service for massacre victims. 01:15

Appearing: Maj. Robert Dash, SOF, calls it massacre. 00:16

Teacher Nguyen Duc Mai, SOF, citizens now scared of VC. 00:18

	Mins:Secs
Wednesday, March 4, 1970	
Cronkite: Sen. Ribicoff's new attack on black market money deals in SE Asia.	00:28
Cronkite: Souvanna Phouma says Laos will fall to N. Vietnam unless US continues bombing.	00:20
Kalb & Mudd: White House launches new effort to calm concern about Laos involvement.	01:40
Appearing: Laird, SOF, "No plans to use US ground forces in Laos."	00:22
Sen. Fulbright, SOF, Senate apprehensive about troops in Laos.	00:38
Thursday, March 5, 1970	
Cronkite: Last week's Vietnam casualty figures.	00:16
Threlkeld: Trans Ngoc Chau convicted again in second trial, gets 10 years.	02:08
Appearing: Tran Ngoc Chau, SOF, "I am a nationalist."	00:04
Cronkite: Paris Peace Talks—Communists charge escalation in Laos.	00:11
Sen. Muskie says Administration follows endless path to victory in Vietnam.	00:22
Friday, March 6, 1970	
Rather: Nixon issues statement giving all facts on Laos.	02:05
Kalb: Washington officials fear possible involvement of US in Thailand if Laos falls.	01:48
Mudd: Senate reaction to Nixon Laos statement: guarded.	00:34

	Mins:Secs
Friday, March 6, 1970 (Continued)	
Appearing: Sen. Cooper, SOF, "US will have to either fight or get troops out."	00:35
Sen. McGovern, SOF, "Senate must continue to get and make public information on war."	00:32
Cronkite: Saigon official says if US Embassy had backed Tran Ngoc Chau up, he would not have been prosecuted.	00:31
Saturday, March 7, 1970	
Mudd: AP says No. Vietnam holding 320, may soon release names.	00:20
Sunday, March 8, 1970	
Mudd: 27 Americans killed in Laos since 1962, White House acknowledges.	00:40
Sargent: Report from Tang Tra where military hearing may prove new American massacre of civilians, last month.	02:30
Monday, March 9, 1970	
Cronkite: White House again ups figures on Laos dead, now "less than 50".	00:40
Cronkite: Pathet Lao offer to exchange views on terms of peace proposal with Laotian government.	01:04
McLaughlin: Report on the fighting in Laos.	02:52
Cronkite: Thieu says all of SE Asia would fall to China if US pulls out.	00:23

	Mins:Secs
Tuesday, March 10, 1970	
Rather: White House will release new statement on position on school desegregation: Nixon concerned about "credibility gap" on desegregation and Laos.	02:12
Cronkite: Western newsmen in Laos get plane trip to see road being built by Chinese in Northern Laos.	00:40
Cronkite: Army accuses 5 more in My Lai massacre, including Capt. Ernest Medina.	00:23
Wednesday, March 11, 1970	
Cronkite: Vietnam action light.	00:24
Cronkite: Capt. Medina (My Lai case) appears at hearing, refuses comment.	00:20
Cronkite: Souvanna Phouma endorses peace talk proposal.	00:14
Cronkite: France calls for everybody to pull out of Laos.	00:14
Cronkite: Cambodia's Sihanouk cancels visits to Moscow, Peking, after anti-Communist demonstrations in Pnom Penh.	00:26
Thursday, March 12, 1970	
Cronkite: Last week's Vietnam casualty figures.	00:20
Cronkite: Laos Premier Souvanna Phouma says he's willing to agree to cease fire.	00:19
Cronkite: State Dept. supports French demand US and N. Vietnam both get out of Laos.	00:31
Friday, March 13, 1970	
Cronkite: Cambodia demands No. Vietnam and VC remove troops.	00:47

	Mins:Secs
Friday, March 13, 1970 (Continued)	
Cronkite: 16 helicopters lost in S. Vietnam last week.	00:14
Rowan: Interviews Capt. Medina, latest to be accused by Army in My Lai massacres.	00:48
Appearing: Capt. Ernest Medina, SOF, describes interrogation of prisoners.	01:32
Cronkite: State Dept. says it's neutral on repeal of Tonkin Gulf Resolution.	00:34
Saturday, March 14, 1970	
Mudd: Sihanouk in Moscow as deadline comes for Cambodia's demand that N. Vietnamese, VC leave country.	00:30
Mudd: Terrorist bombs explode in Saigon.	00:15
Mudd: Mansfield says he's been assured no more B-52 raids will be made on Plain of Jars.	00:18
Mudd: Washington lawyers report on Nov. 15 moratorium released.	00:20
Appearing: Ramsey Clark, SOF, charges Justice Dept. with causing violence.	01:00
Sunday, March 15, 1970	
Herman: Apparent mutiny reported aboard USS Columbia Eagle, carrying bombs to Thailand. Now anchored off Cambodia.	02:30
Mudd: Kosygin sends message to Nixon calling for halt to US military action in Laos.	00:20
Mudd: No. Vietnam, VC, Cambodian representatives to meet tomorrow in Phnom Penh.	00:30

Mins:Secs

Monday, March 16, 1970

Benton: Few facts filtering out on "mutiny" story on ship carrying arms to Thailand. One, names of men thought responsible, Clyde McKay and Alvin Glatkowski. 01:36

Appearing: Asst. Defense Secy. Daniel Henkin, SOF, All hands safe, not charging anyone with mutiny. 00:30

Cronkite: Cambodia opens talks with N. Vietnamese, VC, on Cambodian demand that troops leave country. 00:23

Cronkite: US reports loss of three planes in Laos. 00:13

Cronkite: White House confirms reports on radar installation in Laos being overrun two years ago. 00:20

Kalb: Sen. Fulbright discloses Secy. of State Rogers' testimony before Foreign Relations Committee hearings on Laos. Rogers upset. 01:16

Appearing: Sen. Fulbright, SOF, quotes Rogers that US has no plans to use troops. 00:20

Cronkite: Navy plane crashes at Da Nang, 22 killed. 00:18

Cronkite: US troops in Vietnam down to 460,800. 00:14

Cronkite: Vietnam National Assembly approves legislation for land reform. 00:20

Tuesday, March 17, 1970

Benton: 12 more officers accused in My Lai massacre, bringing total now to 14. 02:20

Appearing Lt. Gen. Peers, SOF, No evidence to indicate suppression of information but "major tragedy occurred." 00:40

	Mins:Secs
Tuesday, March 17, 1970 (Continued)	
Army Secy. Resor, SOF, all charged due a fair trial.	00:28
Cronkite: Cambodian tugs two Columbia Eagle into port of Sihanoukville, 13 crewmen still aboard.	00:32
Cronkite: Cambodia getting nowhere in efforts to get North Vietnam and VC troops out of country.	00:28
Shepard: Report on infiltration route from Cambodia in Mekong Delta area.	02:04
Appearing: Navy Lt. Armand Zeddies, SOF, sees more activity of NVA.	00:37
Cronkite: Sam Thong, US operated base in Laos, evacuated of US troops, expected to fall.	00:30
Cronkite: Sec. of State Rogers clarifies statement released by Sen. Fulbright yesterday—no *present* plans to send troops to Laos.	00:32
Wednesday, March 18, 1970	
Cronkite: Prince Sihanouk deposed in coup d'etat as ruler of Cambodia.	00:48
Raphael: Interview with Sihanouk in Paris last week.	00:20
Appearing: Sihanouk, SOF, does not blame US for coup d'etat.	00:43
Kalb: Washington keeping low profile on Cambodian coup.	01:32
Appearing: Sen. Mansfield, SOF, foresees "disintegration and chaos," would like to see Sihanouk back.	00:46

Mins:Secs

Wednesday, March 18, 1970 (Continued)

McLaughlin: Report on 24 crew members of Columbia Eagle who were put out in lifeboats. 02:22

Silver: West Point cadets pass in review as farewell to General Samuel Koster, accused in My Lai massacre. 00:42

Appearing: General Koster, SOF, Thank you for support. 00:10

Thursday, March 19, 1970

Cronkite: US recognizes new Cambodian government. 00:18

Cronkite: Sihanouk in Peking, getting royal treatment, may set up government in exile. 00:18

Cronkite: Communists at Paris talks say US in trying to enlarge Vietnam War, into Laos and Cambodia. 00:20

Cronkite: Laird says Communists could sweep across Laos. 00:15

Cronkite: Last week's Vietnam casualty figures. 00:20

Cronkite: American Div. Commander, Maj. Gen. Lloyd Ramsey, breaks arm in helicopter crash. 00:27

Cronkite: USIA opinion poll about war conducted in So. Vietnam not available for security reasons. 00:32

Cronkite: Mendel Rivers raps Army for charging 14 officers in My Lai massacre, will hold investigation. 00:30

Cronkite: Thomas Glenn Jolley, who went to Canada to avoid draft, rejected citizenship, tries to get back into country, is refused. 00:31

Cronkite: Antiwar movement demonstrations planned for this week peter out. 00:34

Friday, March 20, 1970	Mins:Secs
Cronkite: Thai troops being used in Laos.	01:00
Cronkite: Cambodia ready to crush attempt by Sihanouk to regain power.	00:22
Cronkite: Ky says Cambodia is vulnerable to takeover by N. Vietnam also that So. Vietnam artillery support to Cambodian troops was informal commanders pact.	00:34
Cronkite: Vietnam action west of Hue, and south of Da Nang.	00:23
Saturday, March 21, 1970	
Mudd: Nixon says Laos action not affecting his decisions on So. Vietnam withdrawals.	00:10
Mudd: American pilots fly scores of missions in Laos.	00:10
Mudd: Nixon said US will continue to respect Cambodian neutrality.	00:20
Sunday, March 22, 1970	
Mudd: Sihanouk to live in Peking and Moscow alternatively.	00:30
Monday, March 23, 1970	
Cronkite: Rogers says Nixon has appealed to Soviets for help in restoring peace in Laos.	00:22
McLaughlin: Report on Communists presenting peace proposals to Laotian government.	01:32
Cronkite: Two fighter planes lost over Laos in past week.	00:17
Cronkite: No. Vietnam declares support for Sihanouk in efforts to overthrow new Cambodian government.	00:26

Mins:Secs

Monday, March 23, 1970 (Continued)

Cronkite: Air Force charges two majors, twelve sergeants with violations in operating Thailand mess halls. 00:13

Tuesday, March 24, 1970

Cronkite: Helicopter shot down in Laos, 11th plane in 14 days. 00:30

Shepard: Cambodian government erasing traces of Sihanouk. 02:12

Morton: Sen. Dodd opens hearings on marijuana use in Vietnam, especially before My Lai. 00:50

Appearing: Dr. Joel Kaplan, SOF, testifies that 50% to 80% of US forces in Vietnam use marijuana. 00:18

Charles West, SOF, testifies that men did smoke marijuana night before My Lai massacre. 00:36

Cronkite: Two enlisted men testify at Long Binh court martial they saw sergeant shoot civilian at orders of First Lt. James Duffy. 00:35

Wednesday, March 25, 1970

Cronkite: Pentagon says marijuana is big problem in Vietnam, but denies link with My Lai massacre. 00:35

Cronkite: Three more charged in My Lai case—total now 25. 00:10

Cronkite: Newspaper reporting Thieu is considering coalition seized in Saigon. 00:30

Thursday, March 26, 1970	Mins:Secs
Cronkite: Vietnam peace group releases names of 34 being held in No. Vietnam, eight of which are new.	00:45
Cronkite: Allies try to talk prisoners at Paris talks, no go.	00:15
Cronkite: Last week's Vietnam casualty figures.	00:12
Cronkite: Ellsworth Bunker may end tour as Ambassador to Vietnam soon.	00:20
Cronkite: No. Vietnam, VC, closing embassies in Cambodia.	00:25
Cronkite: American planes bomb inside Cambodia.	00:10
Friday, March 27, 1970	
Cronkite: So. Vietnamese units attack Communists in Cambodia.	00:38
Threlkeld: Report on a US patrol near Cambodian border.	04:00
Cronkite: White House says Ellsworth Bunker to stay on as Ambassador to So. Vietnam.	00:15
Cronkite: American-backed troops force Communists back near Long Cheng, Laos.	00:17
Saturday, March 28, 1970	
Mudd: New Cambodian government orders mobilization.	00:30
Kalb: State Department concerned over Cambodian situation.	01:10
Appearing: Cambodian Rep. Thay Sok, SOF, believes Cambodia can defend itself.	00:20

Mins:Secs

Sunday, March 29, 1970

Shepard: Report on Cambodian response to VC moving into Cambodia and preparations for possible Sihanouk return. 02:10

Mudd: Lt. Duffy guilty of ordering murder of Vietnamese POW, court reconsiders decision when it learns that life sentence is mandatory. 00:40

Laurence: New men reporting for replacement in War Zone C, So. Vietnam. 05:35

Monday, March 30, 1970

Shepard: Report from Kompong Cham, Cambodia, where a riot led to death of two National Assemblymen and 27 of the rioters. 03:08

Appearing: Allistair Chisholm, SOF, describes riot and believes civil war is near. 00:50

Cronkite: Cambodia to ask UN to get No. Vietnam and VC to withdraw troops. 00:25

Rowan: Troop withdrawals may be slowed by affairs in Laos and Cambodia. 01:32

Cronkite: So. Vietnam guerrillas shell government camp, kill 26. 00:15

Cronkite: James Duffy guilty of murder of So. Vietnam civilian, then court learns life sentence mandatory, reduces charge to involuntary manslaughter, maximum 6 years. 00:21

Schakne: Massachusetts legislature may pass law forbidding Mass. boys to go to Vietnam, which will be court test of legality of Vietnam War. 01:32

Monday, March 30, 1970 (Continued)	Mins:Secs
Appearing: H. James Shea, SOF, says bill will protect Mass. boys and test constitutionality of war.	00:40
William Randall, SOF, believes bill unconstitutional and does not protect Mass. people; does not want to tie President's hands.	00:45
Gov. Francis Sargent, SOF, questions political motivation of bill.	00:33
Tuesday, March 31, 1970	
Reasoner: Troop withdrawal planned by White House in 2 weeks.	00:25
Reasoner: Government forces recapture Sam Thong, Laos.	00:15
Reasoner: Lt. Duffy gets six months in killing of So. Vietnamese prisoner.	00:25
Sargent: Report on people of Dai La hamlet in I Corps of So. Vietnam getting new machine to mill rice.	02:16
Appearing: Capt. Robert McKelvy, SOF, says only way to win people is to make them self-sufficient.	00:35
Wednesday, April 1, 1970	
Cronkite: Communists stage most damaging attacks in five months in So. Vietnam.	00:40
Rowan: Capt. Medina formally accused of blame for slayings of 175 at My Lai.	00:45
Appearing: Capt. Medina, SOF, says he was shocked at charges; did not order massacre.	01:05

Mins:Secs

Wednesday, April 1, 1970 (Continued)

Cronkite: Cambodia says No. Vietnamese overran outpost 5 miles inside border. 00:25

Cronkite: Laos government rejects Communist peace proposals, to offer counter-proposal. 00:20

Cronkite: Anti-antiwar march planned for Saturday, but White House creates flap by sending out letter saying it was postponed when it wasn't. 00:40

Cronkite: Massachusetts legislature passes anti-Vietnam bill. 00:17

Thursday, April 2, 1970

Cronkite: Mass. Governor signs anti-Vietnam War bill. 00:23

Appearing: Gov. Sargent, SOF, explains signing bill; wants issue to go to Supreme Court; cautions against optimism. 01:15

Cronkite: Laird makes no comment on Mass law. 00:15

Cronkite: Fulbright says we should leave SE Asia to No. Vietnam as strongest power in area. Rogers tells Foreign Relations Committee we have no intentions of getting involved in Cambodia. 01:00

Cronkite: Cambodia says American troops have no right to pursue Communists into Cambodian territory. 00:17

Cronkite: 65 more shellings of Allied bases in No. Vietnam. 00:15

Threlkeld: Report on the helicopters being increasingly used in Vietnam. 03:45

Cronkite: Last week's Vietnam casualty figures. 00:20

Cronkite: Paris peace talks — 61st session — no progress. 00:07

Friday, April 3, 1970	Mins:Secs
Cronkite: Communists shell 60 towns and bases in Vietnam.	00:37
Cronkite: Laotian troops who retook Sam Thong accused of looting it.	00:25
Shepard: Cambodian government says calm restored, frees 486 political prisoners.	01:45
Cronkite: Leaders of anti-antiwar march in Washington tomorrow schedule prayer meeting for tonight.	00:18
Saturday, April 4, 1970	
H. Walker: Anti-antiwar march in Washington, led by Rev. Carl McIntire. Appearing: Lester Maddox.	02:40
Mudd: Administration steers clear of numbers game on this march no aerial photos.	00:10
Mudd: Battle reported at Con Thien, So. Vietnam, near DMZ.	00:15
Mudd: Students taking military training in Cambodia.	00:15
Quint: Report on nature of military training in Cambodia.	03:10
Sunday, April 5, 1970	
Mudd: New Cambodian leaders may proclaim republic.	00:30
Mudd: US gunships fire on government outpost by mistake near Pleiku, S. Vietnam. Fighting near DMZ continues.	00:25
Laurence: Whispered report on action in War Zone C—a combat assault. None of the many soldiers identified.	05:50

	Mins:Secs
Monday, April 6, 1970	
Reasoner: Communists beseiging Dak Seang, Green Beret camp near Laotian border in So. Vietnam.	00:52
Laurence: Report on fighting in War Zone C, near Cambodia. This report on one company and "magic" company commander who has had only two casualties; plays it careful.	03:55
Tuesday, April 7, 1970	
Cronkite: Sen. Hart's wife convicted in war protest at Pentagon.	00:25
Cronkite: Communist spring offensive in Vietnam steps up, and assault on Dak Seang continues.	00:33
Cronkite: Heavy fighting in Vietnam and in Cambodia.	00:16
Cronkite: Five newsmen missing, believed captured by VC, include Sean Flynn and Dana Stone working for CBS.	00:17
Threlkeld: Veterans wanting higher pensions, housing, disrupt Saigon in demonstration.	01:45
Cronkite: Antiwar group releases names of 81 prisoners in No. Vietnam, eight of them new.	00:15
Wednesday, April 8, 1970	
Cronkite: Seige of Dak Seang "past crucial period," but both sides bringing in reinforcements.	00:30
Quint: Cambodians definitely at war—in Chipou, near Vietnam border.	01:55

Wednesday, April 8, 1970 (Continued) Mins:Secs

Cronkite: Columbia Eagle — hijacked munitions ship—sails from Cambodian waters. 00:30

Cronkite: Laotian Premier Souvanna Phouma asks halt to bombing except Ho Chi Minh Trail. 00:25

Thursday, April 9, 1970

Reasoner: Last week's Vietnam casualty figures, and cumulative figures for war so far. 00:40

Reasoner: US command says US soldiers have been permitted to cross Cambodia border only on courtesy visits. 00:25

Laurence: Report on Charlie Company in War Zone C, on day company refuses to follow orders of new captain. 06:25

Reasoner: White House says Nixon to make speech on Vietnam next Thursday, 9PM—CBS will televise. 00:15

Friday, April 10, 1970

Reasoner: Senate Foreign Relations Committee votes to repeal Gulf of Tonkin Resolution. 00:30

Reasoner: South Vietnamese relief battalion reaches Dak Seang. 00:22

Reasoner: 100 Vietnamese civilians killed in Cambodia—some say accident, some say massacre. 00:35

Saturday, April 11, 1970

Mudd: Senators Church and Cooper introduce legislation against use of US troops in Cambodia. 00:20

Mudd: Enemy stages new attack on Dak Seang, S. Vietnam. 00:15

	Mins:Secs
Sunday, April 12, 1970	
Mudd: No. Vietnamese attack at Dak Pek, near Cambodian border.	00:20
Shepard: Report on Fire Base Tango, near Dak Seang, which has been under attack almost constantly.	02:32
Mudd: Cambodian troops authorized to attack No. Vietnamese and VC, instead of waiting to be attacked, fight at Pra Saut.	00:25
Monday, April 13, 1970	
Rather: Nixon consults with Laird, military leaders on troop withdrawals for his speech Thursday.	02:00
Cronkite: American troops in Vietnam now at 429,000.	00:30
Cronkite: Rocket attack on Saigon, first in four months.	00:18
Shepard: Report from Tam Kanh, receiving point for casualties from Dak Seang special forces camp.	02:40
Cronkite: Charlie Company involved in near mutiny in Laurence piece 4/9/70, not to be punished.	00:25
Cronkite: Cambodia expecting attack on Svay Rieng.	00:15
Tuesday, April 14, 1970	
Cronkite: Cambodia asks for arms aid, not specifically from us.	00:22
Quint: Report on trip in Cambodia near Vietnam border where Quint and crew were almost captured by VC.	03:20

Wednesday, April 15, 1970	Mins:Secs
Schakne: Antiwar protests for April 15 in Boston.	01:10
Fromson: Antiwar protests in Cleveland.	01:10
Plante: Antiwar protests in Chicago.	00:40
Appearing: Sen. Goodell, SOF, says stop war and rebuild America.	00:15
Pappas: Antiwar protest in Colorado Springs.	01:15
Cronkite: Antiwar protest at U. of Calif. Berkeley campus.	00:20
Rather: Nixon's reaction to protests: we couldn't care less.	01:12
Cronkite: Saigon shelled for second time this week.	00:10
Cronkite: Cambodia Premier Lon Nol appeals to people to drive out Communist Vietnamese forces.	00:15
Cronkite: Many Vietnamese bodies, shot, floating down Mekong River from Cambodian territory.	00:22
Thursday, April 16, 1970	
Cronkite: Russia less cool to thought of new Geneva conference on SE Asia.	00:37
Cronkite: Cambodia appeals to Washington for arms.	00:25
Quint: Report on bodies floating down Mekong River from Cambodia.	01:30
Cronkite: Last week's Vietnam casualty figures.	00:20

	Mins:Secs
Friday, April 17, 1970	
Shepard: South Vietnamese troops moving into Cambodia, but newsmen are kept out.	02:30
Cronkite: Massacre of Vietnamese residents of Cambodia reported at Takeo.	00:30
Cronkite: Nixon to make Vietnam speech Monday evening.	00:12
Laurence: Another report on Charlie Company in War Zone C, this one concentrating on men who want to kill and men who don't.	05:00
Saturday, April 18, 1970	
Mudd: Cambodia says VC have surrounded Takeo, close to Phnom Penh.	00:20
B. Kalb: 100 Vietnamese civilians killed in Takeo by Cambodian soldiers, say survivors.	01:50
Shepard: Student demonstrators demonstrate against Thieu in Saigon.	01:10
Mudd: Secy. of State Rogers says US is seeking clarification of Soviet statement less cool to idea of new Geneva conference on SE Asia.	00:15
Sunday, April 19, 1970	
Mudd: Administration acknowledges extent of US involvement in Laos.	00:40
Appearing: Sen. Symington, SOF, says information must be publicly disclosed.	00:15
Mudd: Heavy ground fighting near Dak Seang, So. Vietnam.	00:25
Laurence: Report on Charlie Company in War Zone C—battalion and Bravo Company command post attacked, 100 enemy killed.	03:50

Sunday, April 19, 1970 (Continued)	Mins:Secs
Hart: Vietnam Moratorium Committee closing national offices, keep local offices open.	00:45
Appearing: Sam Brown, SOF, says national office has passed its useful life; work now has to be done in localities.	01:36
Monday, April 20, 1970	
Cronkite: Nixon to announce 50,000 withdrawal tonight.	00:25
Cronkite: US troops now in Vietnam—425,500.	00:08
Cronkite: Five helicopters shot down over Vietnam yesterday.	00:10
B. Kalb: Report from near Saang, Cambodia, 18 miles from Phnom Penh, taken by VC yesterday.	03:00
Cronkite: VC reject French proposal for another Geneva conference.	00:20
Tuesday, April 21, 1970	
Cronkite: Cambodian troops use Vietnamese civilians as decoys to flush out VC guerrillas.	00:45
Quint: Report from Saang—civilians having trouble getting used to war.	02:00
Cronkite: So. Vietnam force drives 2 miles into Cambodia.	00:22
Cronkite: VC call Nixon withdrawal announcement maneuver.	00:17
Cronkite: Thieu hopes withdrawal will be accompanied by more arms.	00:30

	Mins:Secs
Wednesday, April 22, 1970	
Cronkite: Defense Dept. trying to close tax loophole which makes men exempt from income tax if they only fly over Vietnam once in any month.	00:30
Cronkite: Foreign embassies in Phnom Penh considering evacuation of their dependents.	00:25
Quint: Report on Cambodian army unit's use of Vietnamese civilians as shield, to flush out VC snipers.	01:45
Cronkite: So. Vietnamese troops have entered Cambodia five times in past week.	00:13
Cronkite: Four helicopters shot down over Vietnam yesterday, four planes over Laos.	00:15
Thursday, April 23, 1970	
Rather: Nixon agrees to send arms to Cambodia —captured AK-47 rifles only.	02:00
Cronkite: Senate Foreign Relations Committee sending investigators to look into our involvement in Cambodia.	00:10
Cronkite: Saang, Cambodia, retaken by government troops, and enemy concentrates on taking Takeo.	00:25
Cronkite: Four planes, two copters shot down over Laos and Vietnam yesterday.	00:15
Cronkite: Last week's Vietnam casualty figures.	00:10
Cronkite: Paris peace talks—Communists hint at pullout.	00:20
Cronkite: Lt. Wm. Calley wins 3 month delay in court martial.	00:18

	Mins:Secs
Thursday, April 23, 1970 (Continued)	
Laurence: Last report from Charlie Company in War Zone C—Army says no more. Appearing: PFC Robert Teschker, PFC Lee Boling, PFC George Rivera.	05:00
Friday, April 24, 1970	
Pierpoint: Ron Ziegler says Cambodia conflict is not a civil war, clearly an invasion, as Nixon ponders next move there.	01:45
Cronkite: Soviet accuses US of provocations in Cambodia.	00:17
Cronkite: Communists trying to cut off Phnom Penh.	00:30
Cronkite: Cambodia chief of staff says Vietnamese living there have been fifth column for Communists.	00:17
Cronkite: South Vietnamese have crossed into Cambodia again.	00:22
Rowan: Congressional investigation of My Lai hears Major General Samuel Koster.	01:20
Threlkeld: Report from Song My on how survivors of My Lai are living today.	03:20
Saturday, April 25, 1970	
Mudd: Secy. of State Rogers says No. Vietnam violated Geneva agreements, UN charter in invading Cambodia.	00:25
Threlkeld: Report from An Thanh, So. Vietnam, on refugees returning to So. Vietnam from Cambodia.	02:35

Mins:Secs

Sunday, April 26, 1970

Mudd: Communists threaten Phnom Penh, Cambodia, as Cambodian troops re-occupy Saang. 00:30

Quint: Report from Saang, Cambodia. 03:15

Mudd: Sihanouk said to have left Peking, perhaps for Hanoi, in effort to return to rule in Cambodia. 00:15

Monday, April 27, 1970

Kalb: State Secy. Rogers gives closed door testimony before Senate Foreign Relations Committee on Cambodia. 01:30

Appearing: Sen. Fulbright, SOF, says Rogers gave impression that President would send aid to Cambodia. 00:52

Cronkite: Defense Secy. Laird feels best way to deal with Cambodia is to support So. Vietnamese pursuit. 00:35

Cronkite: Communists press offensives near Phnom Penh, and at Ang Tasom. 00:30

Cronkite: First C-130 gunship of war downed over Laos. 00:25

Tuesday, April 28, 1970

Cronkite: Red China warns US to stay out of Laos, Cambodia. 00:17

Cronkite: US to send 4,000 more captured Communist weapons to Cambodian government. 00:10

Cronkite: Cambodian troops beat back attempt to recapture Ang Tasom in Cambodia. 00:15

Quint: Report on Highway One in Cambodia, running from Phnom Pehn to Vietnam border, most of it in control of VC. 02:10

Cronkite: Five more aircraft lost in Vietnam, Laos in last three days. 00:15

	Mins:Secs
Wednesday, April 29, 1970	
Cronkite: Nixon authorizes US troops going into Cambodia.	00:25
Threlkeld: Report on US troops going into Cambodia.	01:12
Rather: US troops in Cambodia—White House report.	01:25
Rowan: US Troops in Cambodia—Pentagon report.	00:52
Kalb: US troops in Cambodia—State Department report.	00:56
Mudd: US troops in Cambodia—Congress angry.	00:45
Appearing: Senator Aiken, SOF, says he is disappointed, didn't think the President would do it.	00:10
Senator Mansfield, SOF, says he "can't stomach it," it was "most inadvisable."	00:27
Senator Stennis, SOF, says advisers are necessary.	00:22
Thursday, April 30, 1970	
Cronkite: Nixon to address nation at 9PM, CBS will carry.	00:15
Cronkite: Foreign Relations Committee calls move into Cambodia a "grave development".	00:20
Rather: Preview of Nixon's speech on Cambodia.	01:15
Webster and Threlkeld: So. Vietnam troops with American advisers have moved into Cambodia as far as Prasaut.	02:15
Cronkite: Battles continue near Ang Tasom and Takeo, Cambodia.	00:38

	Mins:Secs
Thursday, April 30, 1970 (Continued)	
B. Kalb: Cambodia Foreign Minister says he'll protest move into Cambodia.	01:00
Cronkite: Britain withholds backing Cambodian move, Russia condemns it, as do Communists at Paris peace talks.	00:22
Collingwood: On the thinking behind the Cambodian thrust.	03:35
Cronkite: Last week's Vietnam casualty figures.	00:15
Friday, May 1, 1970	
Cronkite: US troops move into Cambodia.	01:00
Laurence: Report on Charlie Company among those who moved into Cambodia.	03:00
Rather and Hart: Nixon busy with Cambodian move.	01:00
Appearing: Nixon, SOF, says protesting college students are bums; forces in Vietnam are the greatest; doesn't know if people are behind him.	01:20
Herbert Klein, SOF, says Mitchell contributed to decision but was not deciding vote.	00:36
Kalb: Congressional reaction to Cambodian move.	00:50
Appearing: Senator Thurmond, SOF, says President has all facts; deserves support.	00:25
Senator Fulbright, SOF, says meeting with President would be a good thing; Congress should advise him.	00:35

Friday, May 1, 1970 (Continued) Mins:Secs

Cronkite: Sen. Kennedy calls move into Cambodia madness. 00:10

Appearing: Sen. Kennedy, SOF, move cannot be justified. 00:50

Cronkite: Overseas reactions to Cambodian move predictable. 00:40

Dick: Demonstration against Cambodian move on University of Maryland campus spills over. 01:25

Cronkite: Other campus violent protests. 00:35

Cronkite: CBS to do one-hour special Sunday at 8PM on Cambodia. 00:06

Cronkite: 6 helicopters lost over So. Vietnam, 1 plane over Laos. 00:13

Saturday, May 2, 1970

Rowan: Laird says he'll recommend resumption of bombing of No. Vietnam if they retaliate Cambodian move. 01:05

Appearing: Laird, SOF, says this is not an enlargement of war but step toward ending it. 00:30

Webster: Troops moving into Cambodia haven't encountered much of the enemy. 02:25

Mudd: Helicopters collide in Cambodian push. 00:20

Mudd: Russian reaction to Cambodian push. 00:15

Mudd: Hanoi reaction—also charge we've bombed them. 00:30

Schieffer: Foreign Relations Committee now cool on meeting with Nixon. 01:22

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Mudd: Hanoi reaction—also charge we've bombed them.	00:30
Schieffer: Foreign Relations Committee now cool on meeting with Nixon.	01:22

Mins:Secs

Saturday, May 2, 1970 (Continued)

Appearing: Sen. Hatfield, SOF, says Congress must either vote to withhold funds for war or declare war. 00:25

Sen. Scott, SOF, says Congress will vote funds. 00:12

Sunday, May 3, 1970

Rowan: Administration claims uncovering giant supply caches in Cambodia push, call reported raids on North Vietnam "protective reaction." 01:05

Rather: New raids, approved by Nixon, are at least upgraded "protective reaction." 01:00

Syvertsen: Report on fighting in new Cambodian push. 01:32

Webster: Action unexpectedly not heavy in Cambodian push as No. Vietnam HQ still not found. 01:51

Mudd: Agnew on FACE THE NATION questioned by Bruce Morton and George Herman on whether we're occupying Cambodia. 01:40

Appearing: Spiro Agnew; see FACE THE NATION list.

Mudd: Dr. Spock arrested in antiwar demonstration across street from White House. 00:15

Monday, May 4, 1970

Pappas: 4 killed in campus rioting at Kent State Univ. in Ohio. 03:00

Rather: Nixon issues statement of regret on Kent State. 01:10

Monday, May 4, 1970 (Continued) Mins:Secs

Cronkite: Smaller demonstrations at Univ. of Maryland, Stanford—National Student Assn. calls for student strike tomorrow to protest Cambodia. 00:40

Cronkite: China calls Cambodian push "mad provocation." 00:30

Cronkite: Kosygin protests Cambodian push in special news conf. 00:25

Cronkite: Nixon advisers are saying Communists may break off Paris peace talks. 00:22

Cronkite: Laird says raids on No. Vietnam are over, but they could start again. 00:15

Cronkite: Communists move toward Phnom Penh in Cambodia. 00:50

Laurence: Report that Communist HQ in Cambodia may have been found. 02:00

Morton: Foreign Relations Committee, skeptical, agrees to White House briefing, along with House Foreign Relations Comm. 01:20

Appearing: Sen. Fulbright, SOF, feels meeting subverts independent judgment of Congress more interested in consultations then briefings. 00:30

Tuesday, May 5, 1970

Rather: Nixon meets with Congressional Armed Services, Foreign Relations Committees on Cambodia. 00:53

Appearing: Sen. Tower, SOF, says invasion was necessary move to shorten war. 00:25

Sen. Schweiker, says war is tearing country apart; cannot support it. 00:20

	Mins:Secs
Tuesday, May 5, 1970 (Continued)	
Kalb: Rogers, Laird, opposed Cambodian push.	01:25
Cronkite: Air raids on No. Vietnam were followed by one more Nixon didn't know about.	01:25
Cronkite: Student strikes reported in 114 colleges.	01:00
Cronkite: Mrs. Nixon calls off trip, and Nixon calls off weekend trip, because of demonstrations.	00:30
Cronkite: Cambodia approves Cambodian push.	00:13
Cronkite: Allies launch new push at third point on Cambodian border, farther north.	00:15
Syvertsen: Allies uncover major enemy base in Cambodia.	01:30
Cronkite: U Thant calls for Indochina conference.	00:12
Cronkite: British Labourites say Cambodian push could hamper withdrawal plans.	00:17
Cronkite: So. Vietnamese schools, colleges closed fearing anti-Thieu demonstrations.	00:15
Cronkite: Tran Ngoc Chau, Thieu enemy, sentenced to 10 years two months ago, has trial declared unconstitutional.	00:21
Wednesday, May 6, 1970	
Cronkite: No. Vietnam may be launching counter-offensive.	00:25
Shepard: Report from the scene as new attack into Cambodia is launched. Soldiers feel unprepared.	03:20
Cronkite: House rejects antiwar amendments by large votes.	00:15

Wednesday, May 6, 1970 (Continued)	Mins:Secs
Cronkite: First shipment of rifles to Cambodia completed.	00:15
Cronkite: Laird, Rogers say they supported Nixon's move into Cambodia.	00:25
Cronkite: No. Vietnamese call off today's peace talks.	00:20
Cronkite: Troops ordered into Saigon as unrest appears to be growing.	00:22
Morton: Antiwar march on Washington planned for Saturday.	02:00
Thursday, May 7, 1970	
Reasoner: White House says troops in Cambodia captured major base complex 25 miles north of Snoul.	00:45
Laurence: Report on US troops near Snoul—making friends.	01:30
Duvall: Report on US troops in Snoul—making no friends.	01:30
Reasoner: So. Vietnam plans to send boats up Mekong River to Phnom Penh.	00:50
Reasoner: Last week's casualty figures from Vietnam.	00:25
Morton: Demonstrators, officials, still stalemated over location of weekend antiwar demonstration in Washington.	02:20
Reasoner: 136 colleges across country closed because of war protests.	00:20

	Mins:Secs
Friday, May 8, 1970	
Cronkite: Effects of Nixon Cambodian move—schools closed, thousands expected at Washington rally tomorrow.	00:50
Schorr: Congress doves stay behind in general exodus to align selves with protestors.	01:00
Appearing: Sen. Percy, SOF, says politicians would listen to youth if they campaigned.	00:15
Sen. McGovern, SOF, only effective way to end war is constitutional.	00:22
Sen. Muskie, SOF, says we need to withdraw from Vietnam to rebuild our country.	00:18
Cronkite: 250 in State Dept. express concern, apprehensive over Cambodian push.	00:16
Schoumacher: Washington officials compromise with demonstrators, will allow meeting on Ellipse.	02:30
Cronkite: J. Edgar Hoover says Communists were in last November antiwar rally.	00:20
Dean: New York construction workers break up antiwar rally on Wall Street.	02:00
Plante: Ohio students march on State Capital in demonstration.	01:10
Cronkite: Big battle just south of DMZ in So. Vietnam.	00:35
Cronkite: Allies don't expect to find Cambodian Communist military headquarters now.	00:15

Friday, May 8, 1970 (Continued)	Mins:Secs
Cronkite: Thieu says he has no deadline for withdrawal from Cambodia.	00:15
Culhane: Boston area students campaigning to get people to send antiwar letters, cards, telegrams to Congress.	03:00
Saturday, May 9, 1970	
Hart: Washington antiwar protest—hot day.	02:30
Schieffer: SDS meeting at Labor Dept. cooled by demonstration marshals.	01:15
Rather: Nixon got up early, went to Lincoln Memorial, talked to students worked during day.	01:25
Mudd: Administration issues list of captured equipment in Cambodian push.	00:25
Pierpoint: Speeded-up withdrawal not answer to Cambodian push critics, Nixon aides say.	01:20
Mudd: Sihanouk, interviewed in Peking by Australian newsman says Communists less of threat to Cambodia than So. Vietnam.	00:30
Appearing: Sihanouk, SOF, says So. Vietnamese want territory in Cambodia; Americans will be defeated.	02:10
Mudd: US, So. Vietnamese boats move up Mekong River.	00:30
Shepard: Allied troops advance in Fishhook area.	02:25
Mudd: Demonstrations against US Cambodian push in London, Berlin.	00:20
Mudd: Mass. lawmaker, author of anti-Vietnam war bill, James Shea, shoots self.	00:20

Mins:Secs

Saturday, May 9, 1970 (Continued)

Morton: Students from conservative Moravian College in Pa. go to Washington to join antiwar protest. 04:20

Sunday, May 10, 1970

Schoumacher: Washington back to normal after antiwar protest. 01:20

Schieffer: Interviews students who talked to Nixon early yesterday morning at Lincoln Memorial. 02:00

Pierpoint: White House satisfied with how yesterday's antiwar protest went.

Mudd: Administration hopes to have only volunteers in Vietnam by 1972. 00:30

McLaughlin: Neak Luong, Cambodia, captured in Mekong River push. 02:40

Quint: Report on Mekong River push into Cambodia. 02:00

Monday, May 11, 1970

Cronkite: Laird says Nixon deadline for Cambodia withdrawal will be met. 00:25

Benton: Senate Foreign Relations Committee approves cutting off funds for Cambodia after June 30. 01:20

Appearing: Sen. Frank Church, SOF, says "mistaken war should not be won; crisis in our country; Congress must take initiative. 00:45

Monday, May 11, 1970 (Continued) Mins:Secs

Morton: Students lobbying in Congress against Cambodia. 01:00

Kalb: Students lobbying in State Dept. against Cambodia. 02:20

Appearing: Yale President Kingman Brewster, SOF, says system is not working and will turn activists into revolutionaries. 01:00

Cronkite: George Wynn, Jr., Navy captain's son, dies in San Diego after burning self to protest Cambodia. 00:30

Dean: Construction workers demonstrate for war again in lower New York. 02:25

Cronkite: So. Vietnam boats traveling up Mekong River arrive in Phnom Penh. 00:30

Cronkite: US advisers went along on above trip —beyond 22-mile limit. 00:20

Shepard: US company in Cambodia comes upon recently abandoned enemy camp. 02:36

Webster: Thieu says So. Vietnam will return to Cambodia if necessary. 00:25

Appearing: Thieu, SOF, says ARVN might return to Cambodia later. 00:30

Cronkite: Rocket attack on Saigon. 00:12

Cronkite: Xuan Thuy leaves Paris peace talks for Hanoi, will return talks to continue. 00:22

Cronkite: Souvanna Phouma says Communists have launched new offensive in Laos. 00:17

	Mins:Secs
Tuesday, May 12, 1970	
Rowan: Laird tells Senate Armed Services Comm. troops are already being withdrawn from Cambodia.	01:05
Appearing: Laird, SOF, says US troops will all be out by end of June; all Nixon's pledges have been fulfilled.	01:20
Cronkite: Retired Lt. Gen. James Gavin says Cambodia could lead to ultimate US-China confrontation.	00:40
McLaughlin: Report on So. Vietnam fleet moving up Mekong River beyond Phnom Penh.	03:10
Culhane: Univ. of Maine blood drive for Vietnam.	02:36
Wednesday, May 13, 1970	
Cronkite: No. Vietnam counterattacks in Cambodia push.	00:30
Shepard: Huge ammunition cache found in Cambodia.	02:30
Cronkite: Pentagon says enemy in Cambodia failed to follow orders to stand and fight.	00:25
Cronkite: Senate opens debate on US involvement in Cambodia.	01:00
Schoumacher: Student groups lobby against war in Justice Dept.	01:10
Appearing: Atty. Gen. Mitchell, SOF, says more unrest now than ever before; "dissent is a good thing" but changes must take place within the system.	01:15

Thursday, May 14, 1970 Mins:Secs

Mudd: Nixon sends Laird, Kissinger, State Underscretary Richardson to Capitol Hill to lobby against new antiwar bill. 01:30

Appearing: Sen. Griffin, SOF, is against amendment; enemy has to believe President. 00:35

Sen. Goodell, SOF, reported that Laird and Kissinger said operation in Cambodia was successful. 00:25

Sen. Baker, SOF, says basis of cooperation between Congress and President was laid. 00:25

Cronkite: Laird says threat from Cambodia withdrawn. 00:30

Cronkite: Last week's Vietnam casualty figures. 00:45

Cronkite: New offensive launched against Cambodia. 00:20

Laurence: First Air Cav. Major Gen. Elby Roberts says farewell to troops. 03:00

Cronkite: Russia asks for joint Russian-Chinese policy on Indochina. 00:20

Rather: Nixon awards medals at White House. 01:00

Kalb: Ellsworth Bunker testifies before Senate Foreign Relations Committee. 01:20

Appearing: Ellsworth Bunker, SOF, says State Dept. policy forbids open hearings. 00:05

Sen. Fulbright, SOF, says Comm. discovered H-2 rifles were sent to Cambodia. 00:35

Cronkite: Paris peace talks mark second anniversary. 00:30

	Mins:Secs
Friday, May 15, 1970	
Cronkite: Senate continues debate on Cambodia fund cutoff amendment.	00:35
Appearing: Sen. Scott, SOF, feels amendment is contributing to polarization of country; wants compromise.	01:00
Rather: Nixon in Florida opposes antiwar amendment.	01:20
Cronkite: So. Vietnam says Highway One in Cambodia to Phnom Penh is now clear.	00:17
Cronkite: Communists attack in NE Cambodia.	00:20
Threlkeld: Report on US forces' continued search for COSVN in Cambodia.	02:15
Cronkite: Armed Forces Day programs across country cancelled.	00:20
Saturday, May 16, 1970	
Mudd: Communists enter Kompong Cham, Cambodia.	00:55
Schakne: Antiwar demonstrations cast shadow over Armed Forces Day at Fort Dix, New Jersey.	01:25
Davis: Antiwar demonstrations cast shadow over Armed Forces Day at Fort Bragg, No. Carolina.	01:00
Pappas: Antiwar demonstrations cast shadow over Armed Forces Day at Great Lakes Naval Training Station, No. Chicago, Illinois.	01:00

Sunday, May 17, 1970	Mins:Secs
Mudd: Allies launch new drive into Cambodia.	00:35
Miller: Communists withdraw from Kompong Cham, then attack again.	01:10
Syvertsen: Continuation of above Miller report.	01:30
Mudd: 11 Pacific nations meet in Djakarta, call for withdrawal from Cambodia.	00:15
Mudd: Sen. Mansfield on FACE THE NATION says he'll co-sponsor McGovern-Hatfield bill, calling for no funds for Indo-China after next year.	00:30
Mudd: Agnew criticizes Mansfield move, students.	00:15
Schieffer: Antiwar students settling in Washington for lobbying.	03:10
Mudd: Two enlisted men accused in My Lai massacre say they're not allowed to choose own attorneys.	00:25
Monday, May 18, 1970	
Cronkite: Communists strike 22 miles from Phnom Penh.	00:20
Kalb: Laird admits to Senate Foreign Relations Comm. US advisers have been in Laos.	01:30
Appearing: Laird, SOF, says no US forces operating in Laos; Cambodian incursions will not harm SALT talks.	00:50
Sen. Gore, SOF, asks Laird question.	00:06
Sen. Fulbright, SOF, asks Laird question.	00:15
Cronkite: Herb Klein, in Chicago press conference, tells about vast amounts of material captured in Cambodia.	00:25
Appearing: Klein, SOF, says 16 times normal amount of material captured.	01:20

Mins:Secs

Monday, May 18, 1970 (Continued)

Rowan: Clark Clifford comes out against Cambodian push. 00:10

Appearing: Clifford, SOF, says Cambodia operation will spread war; Nixon has not learned lessons of past five years. 01:30

Cronkite: China denounces allied drive into Cambodia; it's Ambassador won't meet ours in Warsaw this week as a protest; it says the war in So. Vietnam can go for 100 years. 00:30

Tuesday, May 19, 1970

Morton: Senate continues debate over Cooper-Church antiwar amendment. 01:30

Appearing: Sen. Allott, SOF, feels that amendment is politically motivated. 00:30

Sen. Church, SOF, says it is not partisan and does not undermine President. 00:30

Cronkite: Sen. Mansfield says administration has violated congressional ban on involvement in Laos. 00:18

Cronkite: Communists shell bases in So. Vietnam. 00:16

Shepard: Report on Saigon troops advancing in Cambodia. 02:15

Cronkite: American trade exhibit opened in Stockholm, Trade Minister makes anti-Cambodian push remarks. 00:30

Wednesday, May 20, 1970

Dean: Construction, trade unions stage gigantic pro-Nixon rally in New York. 01:40

		Mins:Secs
Wednesday, May 20, 1970 (Continued)		
Benton:	New York lawyers go to Washington to lobby against war.	01:00
Appearing:	Francis Plimpton, SOF, "War too important to be left to President."	00:25
	Sen. Dole, SOF, says amendment is badly times; is political.	00:33
Cronkite:	3,000 So. Vietnam troops cross into Cambodia in new push.	00:25
Syvertsen:	Report on one battle in Cambodia, from the Cambodian Army's side.	02:20
Kalb:	State Department says So. Vietnam troops probably won't leave Cambodia on Nixon's deadline.	01:10
Cronkite:	Sen. Scott takes soft compromising line on antiwar amendment; Sen. Griffin calls it affront to Nixon.	00:30
Cronkite:	Mao says danger of new world war exists.	00:20
Thursday, May 21, 1970		
Mudd:	Senators Cooper and Church soften language of their anti-Cambodia amendment, hoping for more support.	02:00
Cronkite:	So. Vietnamese troops drive deeper into Cambodia, and Ky says they won't leave June 30th, prompting discussion in Washington and Phnom Penh.	01:30
Cronkite:	Last week's Vietnam war casualty figures.	00:17
Webster:	Long piece answering Pentagon, White House charges that a story, showing an atrocity, originally broadcast November 3, 1969, might have been faked.	10:30

Mins:Secs

Friday, May 22, 1970

Cronkite: Laird says So. Vietnamese in Cambodia shouldn't be held to any firm timetable for leaving. 00:45

Cronkite: Administration still opposes revised anti-Cambodia amendment in Senate. 00:07

Cronkite: US helicopters attack So. Vietnam unit by mistake, kill nine. 00:10

Shepard: Report on one company in Cambodia that has met enemy 20 times in 14 days. 02:10

Cronkite: Communist financial expert defects to Saigon. 00:17

Cronkite: White House denies it's investigating CBS News, replying to piece last night. 00:45

Saturday, May 23, 1970

Mudd: So. Vietnam sends 7,000 more troops to Cambodia, will keep them there as long as necessary. 00:20

Duvall: Cambodian soldiers kept prisoners by VC two months freed by So. Vietnamese. 02:45

Mudd: Hugh Scott discounts Saigon saying it'll stay in Cambodia as bombast. 00:25

Culhane: Report on college students working within system for peace, getting haircuts, organizing computer systems to elect peace candidates. 05:15

Appearing: Fred Miller, Ned Claxton, Bill Hendricks, Douglas Arnett, Lewis Kaden, Rep. Edward Patton.

Sunday, May 24, 1970	Mins:Secs
Rather: High administration official says criticizers of Cambodia policy in Administration should resign.	01:40
Mudd: Appeal by Gen. Abrams led to Cambodian push.	00:20
Webster: Report on a trip in Cambodia in which Webster and his crew nearly got captured by Communists, but talked their way out of it.	02:30
Drinkwater: Report on antiwar movement's efforts to aid in draft evasion in Oakland, California.	06:35
Monday, May 25, 1970	
Cronkite: Cambodian For. Min. Yem Sambaur says he'll ask US, So. Vietnam to stay as long as war lasts.	00:23
Cronkite: Administration officials say we'll be out of Cambodia a week earlier than expected.	00:30
Cronkite: Sihanouk flies from Peking to Hanoi, but Hanoi says each country's people must liberate themselves.	00:22
Cronkite: Fatalities in Cambodia pass 200 mark.	00:13
Shepard: Report on Bravo Company, 7th Air Cav. Reg., 1st Air Cav., which has had heavy casualties in Cambodia.	03:30
Tuesday, May 26, 1970	
Cronkite: Communist resistance stiffening in Fishhook, Cambodia.	00:22
Cronkite: So. Vietnamese have pulled 16,000 troops out of Cambodia.	00:12

	Mins:Secs
Tuesday, May 26, 1970 (Continued)	
Cronkite: So. Vietnam, Cambodian foreign ministers talking in Saigon about resuming diplomatic relations.	00:12
Fromson: Romney goes to Chicago Presbyterian convention to justify Cambodia.	01:00
Appearing: Romney, SOF, compares Cambodia with our reaction if Russians were in Canada.	01:05
Cronkite: Senate votes on conciliatory amendment to anti-Cambodia bill, passes it 82 to 11.	00:40
Cronkite: State Dept. says small arms shipments to Cambodia have begun, to total 8 million.	00:15
Wednesday, May 27, 1970	
Cronkite: US bombs targets in North Vietnam Monday.	00:30
Cronkite: Five more helicopters lost in So. Vietnam.	00:10
Shepard: Bravo Company, which Shepard has been following, takes Hill 423, names it Shakey's Hill, after one of company killed in battle.	03:40
Cronkite: Senate Rules Comm. says Sen. Hatfield's franking privilege was used illegally to send out antiwar letters—he'll pay $2,175 postage.	00:22
Cronkite: Laird hopes to exceed Nixon's Vietnam withdrawal figure of 150,000 by May by 30,000.	00:22

Wednesday, May 27, 1970 (Continued)	Mins:Secs
Cronkite: Cambodian gov't. puts together alliances with Thailand, So. Vietnam.	00:30
Cronkite: President Thieu is interviewed by N.Y. TIMES Correspondent Terence Smith for Educational TV.	00:45
Appearing: President Thieu, SOF, says So. Vietnamese troops will stay in Cambodia but without much US support.	01:15
Thursday, May 28, 1970	
Kalb: Senate to vote on anti-Cambodia amendment Tuesday; Sen. Dole predicts Nixon will veto it.	00:45
Appearing: Sen. Dole, SOF, says Nixon will veto because it takes away his powers to protect troops.	01:30
Cronkite: Rep. Silvio Conte says State Secy. Rogers censored his testimony on Cambodia before House in the record, not for security, but to avoid embarrassment.	00:35
Cronkite: Last week's Vietnam war casualties.	00:25
Cronkite: Communists cut Highway 200 miles from So. Vietnam border in Cambodia.	00:16
Cronkite: Cambodians repulse Communist attack on Prey Veng.	00:13
Cronkite: Cambodia, Thailand resume diplomatic relations, Thailand may help in defense of Phnom Penh.	00:30

	Mins:Secs
Friday, May 29, 1970	
Cronkite: Prey Veng, Cambodia, scene of big battle between Communists and Cambodian-So. Vietnamese troops.	00:27
Cronkite: Communists blow up bridge on highway between Saigon and Phnom Penh.	00:15
Cronkite: VC using toads in war—throw them into Cambodian camps, Cambodians open fire, disclosing positions.	00:22
Cronkite: Students demonstrate against Thieu in Saigon.	00:25
Saturday, May 30, 1970	
Mudd: VC attacks Da Lat, So. Vietnam.	00:30
Rather: Nixon summons top military advisers from Washington, So. Vietnam, Honolulu to Western White House for conference tomorrow.	02:30
Sunday, May 31, 1970	
Rather: Nixon meets top military advisers, White House trying to play it down.	01:10
Quint: Report on VC attack on Da Lat, So. Vietnam.	03:00
McLaughlin: Report on VC attack on Da Lat, So. Vietnam.	00:50

Comments of CBS

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CBS EVENING NEWS

Comments by Eric Sevareid
on Indochina War and Domestic Reaction

March, April, May 1970

	Mins:Secs
Monday, March 30, 1970	
Sevareid: On worsening crisis in Cambodia, and Nixon's troubles on troop withdrawals because of it.	02.32
Tuesday, March 31, 1970	
Sevareid: On the nation's labor problems, inflation, troop withdrawals and military cutbacks.	02:15
Thursday, April 2, 1970	
Sevareid: On French proposal to treat Vietnam, Laos, Cambodia as one war, negotiate between big powers.	02:35
Tuesday, April 21, 1970	
Sevareid: On Nixon troop withdrawal announcement.	02:32
Thursday, April 23, 1970	
Sevareid: On two foreign crisis areas, Cambodia and Trinidad, with emphasis on Trinidad.	02:36
Monday, April 27, 1970	
Sevareid: On Cambodian dilemma facing Nixon.	02:45
Thursday, April 30, 1970	
Sevareid: On the new phase of the fighting in Indo-China, and Nixon's dilemma.	02:30

	Mins:Secs
Friday, May 1, 1970	
Sevareid: On the ramifications of move into Cambodia.	02:15
Monday, May 4, 1970	
Sevareid: On Kent State Univ., Student unrest, Cambodia.	02:35
Tuesday, May 5, 1970	
Sevareid: On America's crises—Cambodia, decline of presidency.	02:45
Wednesday, May 6, 1970	
Sevareid: On Nixon decisions on Indo-China.	02:40
Tuesday, May 12, 1970	
Sevareid: On issue of Cambodia and Washington's preoccupation with it.	02:45
Thursday, May 14, 1970	
Sevareid: On the new form and depth of antiwar movement.	02:30
Monday, May 25, 1970	
Sevareid: On our preoccupation with Far East making it difficult for us to pay attention to what's going on in Mideast.	02:30
Tuesday, May 26, 1970	
Sevareid: On confusion in Washington about timetable for withdrawal from Cambodia.	02:20
Wednesday, May 27, 1970	
Sevareid: On effects of Indochina War, and our entry into Cambodia.	02:36

PRESIDENT NIXON'S ADDRESSES NOVEMBER 1969 - JUNE 1970

Date	Title	Time
11/ 3/69	President Nixon's Address on Vietnam War Policy	9:30-10:02 P.M.
12/15/69	President Nixon's Address on Vietnam	6:00- 6:14 P.M.
1/22/70	President Nixon's State of the Union Message	12:30- 1:30 P.M.
4/20/70	President Nixon's Address to the Nation on Vietnam	9:00- 9:30 P.M.
4/30/70	President Nixon's Address to the Nation re Cambodia	9:00- 9:41 P.M.
6/ 3/70	President Nixon's Address on Cambodia	9:01- 9:16 P.M.

CBS News Analyses re President Nixon's Addresses:

Date	Title	Min.:Sec.
11/ 3/69	CBS NEWS SPECIAL REPORT: Analysis of President Nixon's Address on Vietnam War Policy	
	Dan Rather: Summarized Nixon's Speech	1:12
	Marvin Kalb: Commented that speech's content was not new and that the speech was aimed at the "great silent majority." Also noted Nixon's efforts toward a negotiated settlement.	1:24
	Eric Sevareid: Stated speech was a low-keyed call for support of Nixon's Vietnam policies. Also stated he felt something else would follow this speech, such as troop withdrawals.	2:28

Date	Title	Min.:Sec.
	Marvin Kalb: Again noting nothing new in speech.	1:00
	Correspondents agreed that Nixon is trying to keep Vietnam from becoming a humiliating loss.	1:00
12/15/69	CBS NEWS SPECIAL REPORT: Analysis of President Nixon's Address on Vietnam.	
	Bruce Morton commentary re President Nixon's Speech on Vietnam.	3:00
1/22/70	CBS NEWS SPECIAL REPORT: Analysis of President Nixon's State of the Union Address.	
	Roger Mudd: Summarized three main points of President's speech: inflation, crime, and environment and President's request for cooperation from democratically controlled Congress.	3:32
	Marvin Kalb: Commented on general foreign policy aspects of speech particularly Vietnam. No change in policy noted. Also summarized Nixon's new global approach fidelity to specific treaty commitments while cutting back in other countries.	2:00
	Eric Sevareid: Stated that speech denotes a new relationship between the United States and the world—this being a break from U.S. foreign policy of past 25 years. Other remarks on original purposes of a State of the Union Address.	2:48

Date	Title	Min.:Sec.
	Dan Rather: Speech and delivery excellent but also commented on Moynihan's noticeable influence. Commented that Nixon had been badly underestimated and that speech proves otherwise, especially where Nixon has taken away nearly all Democratic Party issues.	3:12
	Roger Mudd: Comments on Democratic Party reactions and attempt to steal issues from the President.	1:04
	Eric Sevareid: Summarized problems Nixon still has facing him: 1. Vietnam withdrawal policy. 2. Inflation. 3. Negroes—no specific mention in speech.	1:48
	Marvin Kalb: U.S. role in Nigeria Guam Doctrine vs. starvation.	1:16
	Brief summary of speech followed.	1:40
4/20/70	CBS NEWS SPECIAL REPORT: Analysis of President Nixon on Vietnam	
	Roger Mudd: Withdrawal of 150,000 troops a surprise—expected only 50,000.	1:20
	Dan Rather: Comments on military objections to such a massive withdrawal. Withdrawal figure was compromise but more in favor of Nixon's view than military.	0:44
	Roger Mudd: Question on Laos and Cambodia.	0:12
	Dan Rather: Comment on short notice of advanced copies of speech but states speech was never advertised as being on Indochina—solely Vietnam.	0:40

Date	Title	Min.:Sec.
	Eric Sevareid: Statements on Hanoi's reaction and fact that Nixon has enlarged area of warning to include Laos and Cambodia. Seemed to Sevareid Nixon was discussing Indochina.	1:28
	Roger Mudd: Question about effect of Paris Peace Talks on withdrawals.	0:12
	Dan Rather: Commented that troop withdrawals does not mean the stoppage of sending troops to Vietnam. Credibility gap mentioned —Rather said not entirely Nixon's fault but everyone's fault. That war involves killing must not be forgotten.	1:16
	Roger Mudd: Question that even though combat troops will be withdrawn we would still be there with other supplies.	0:12
	Richard Threlkeld: Comments on troop reductions and Vietnamization of the fighting. Stated that Vietnamization has shown how dependent Saigon is on U.S. military but has helped South Vietnam government extend its influence to the people.	3:36
	Closing statements that Nixon has taken some political fever out of Vietnam issue.	1:36
4/30/70	CBS NEWS SPECIAL REPORT: Analysis of President Nixon on Cambodia	
	Dan Rather: Summary of Nixon's speech.	2:32
	Marvin Kalb: Comments on diplomatic advisers losing to military advisers. Cambodian reaction to Nixon's move.	1:24

Date	Title	Min.:Sec.
	Dan Rather: Noted an advanced briefing given to press and advanced text available one hour and forty-five minutes.	0:48
	Steve Rowan: Comments on military aspects units involved and military beliefs of necessity of this action.	2:48
	Dan Rather: Statements on expected casualties.	1:00
	Charles Collingwood: Influence of speech on enemy, particularly at Paris talks.	1:08
	Marvin Kalb: Noted President also directed his speech to Congress, which will probably explode. Reference to Senator Aiken.	0:40
	Dan Rather: Nixon's move to be basically defensive but risk involved due to Communist China.	0:44
	Charles Collingwood: Stated neither Soviet Union or Communist China will go to war over this issue even though there will be loud gestures.	0:36
	Marvin Kalb: Agrees with Collingwood and voices hope that Nixon's plan will shorten war but that past efforts have failed.	1:00
	Charles Collingwood: Enemy is weaker now. Military aspects of war.	1:12
	Marvin Kalb: Whereas U.S. will not be humiliated it is unlikely North Vietnam will, in consideration of how long they have been engaged in battle.	0:24
	Dan Rather: Important to point out that Nixon does not see this as a Cambodian war but rather as a defensive maneuver to his policy of Vietnamization.	1:00

Date	Title	Min.:Sec.
	Charles Collingwood: Nixon has succeeded in splitting difference between Joint Chiefs and Defense Secretary.	0:32
	Dan Rather: Political consequences of speech. Comparison to Johnson on March 31, 1968.	0:28
	Charles Collingwood: Commented that Cambodia has always been a part of the war, at least for the enemy, and now it's going to be part for us. Political effects noted.	0:52
	Steve Rowan: Comments on Congressmen that will likely support Nixon.	0:20
	Dan Rather: Summary and Close.	0:56
6/ 3/70	CBS NEWS SPECIAL REPORT: Summary and Analysis of President Nixon's Speech.	
	Dan Rather: Summarized main points of Nixon's speech; concluded nothing new except troop withdrawal announcement.	1:48
	Eric Sevareid: Discussed Nixon's motives for interim report. Noted difficulty of critics to second guess Presidential statistics of captured enemy supplies. Was corrected by Rather over his statement that Nixon left out statistics on enemy casualties.	3:00
	Bert Quint: (from Asia) Assessed Cambodian opeartion as a success. Pointed out necessity of Cambodia's new government remaining strong to thwart enemy operations. Commented on morale boost given South Vietnamese army by successes.	2:00

ANALYSIS OF CBS NEWS SPECIALS AND CBS NEWS SPECIAL REPORTS COVERAGE OF INDOCHINA WAR AND DOMESTIC REACTION NOVEMBER 1969 - JUNE 1970

Date	Title	Min.:Sec.
12/23/69	A CONVERSATION WITH SECRETARY OF STATE WILLIAM ROGERS	
	Reporter: Eric Sevareid	
	Rogers: Will leave question of whether it was a mistake to go into Vietnam to historians. We are now doing our best to get out; less criticism abroad of our policy there. Rejects domino theory but considers effect of U.S. defeat would be far-reaching. Vietnam situation international aggression, not civil war.	8:30*
12/26/69	THE CORRESPONDENTS REPORT: END OF A DECADE	
	Sevareid: Vietnam worst overseas mistake for U.S. of all time; disastrous effect on domestic spirit, confidence, economy, politics.	1:00*
	Collingwood: But we are beginning to get out of Vietnam and if Vietnamization works, we can get out with clear conscience and turn to other things.	0:45*
	Sevareid: Nixon better at healing world problems than domestic; Vietnam plan gives him some "elbow room" at home by silencing critics; but methods of opposing dissent, including Vice President's demagogic speeches, very bad.	2:00*

* Broadcast covered other subjects. This was time devoted to Indochina War and Domestic Reaction.

Date	Title	Min.:Sec.
	Collingwood: Policy of getting out of Vietnam popular abroad and among servicemen; has not lowered confidence in U.S. keeping overseas commitments.	1:30*
2/ 6/70	LBJ: THE DECISION TO HALT THE BOMBING	
	Cronkite: Who played key notes in decision.	0:36
	Johnson: Disagreement among advisers. LBJ asks for a plan.	0:32
	Cronkite: History of bombing.	0:32
	Johnson: Announcement of stopping of bombing.	0:20
	Cronkite: When and how did LBJ make the decision.	0:28
	Johnson: Recalls trip to Australia, made plans to see Pope; discusses criticism of American people, Tonkin, Gulf Resolution and relations with Congress.	8:20
	Westmoreland: Vietnam encouraging and optimistic—we're making real progress.	0:20
	Cronkite: Describes Tet offensive.	0:36
	Johnson: Explains why progress report was accurate in light of later developments. Also explains psychology behind Americans' reactions to Tet. Conference with generals to decide to send in more troops. Reads portion of directive to Clifford that was misunderstood by members of his administration and the media.	10:32

Date	Title	Min.:Sec.
	Johnson: Discusses Clifford's statement about the impossibility of a military victory and his feelings on this.	1:16
	Johnson: Advisers' opinions on stopping bombing and his reaction.	2:04
	Johnson: Developments from Rusk's recommendation for a halt until the actual speech.	2:04
	Johnson: Reports on recommendation from unofficial advisers to halt bombing and their influence on him.	1:56
	Johnson: Reaction to Acheson's disenchantment with Joint Chiefs of Staff briefings.	0:44
	Johnson: Discussion of Rusk's intentions in stopping bombing.	0:56
	Dean Rusk: Partial succession of bombing will not bring peace.	0:24
	Johnson: Still felt it was worth a try.	0:32
	Johnson: Explains apparent discrepancy between two confusing statements made by Rusk.	1:16
	Johnson: Revealed his expectations for bombing halt.	2:00
	Cronkite: Effects of bombing halt.	0:32
5/ 3/70	WHERE WE STAND IN CAMBODIA	
	President Nixon: No invasion of Cambodia. Only purpose is to drive enemy out of his sanctuaries, then to withdraw.	0:20
	Hubert Humphrey: Cambodian action will lead to an expansion of the war and protest in U.S.	0:28

Date	Title	Min.:Sec.
	Collingwood: Attack on sanctuaries in Cambodia and resumption of bombing of North Vietnam. Americans surprised at this. Storm of debate has arisen.	1:20
	President Nixon: Action taken will speed up end of war and lessen casualties.	0:36
	Collingwood: CBS poll shows 59% approve of action taken but public is confused and frustrated.	2:16
	Threlkeld: Assesses impact of Cambodian operation—a gamble.	2:40
	Major General L. V. Roberts: Action of great significance and unsettling to the enemy.	0:24
	Threlkeld: Timetable of troop withdrawal is no longer certain. U.S. again is not controlling in Indochina.	0:56
	Collingwood: Description of Cambodia and plan of operation. Major re-escalation of war noted. Is it worth it?	2:36
	General Maxwell Taylor: Favors President's action. If it succeeds it will shorten the war. This is a war of the U.S. government and the U.S. people—not just the military. Some in the U.S. want to give up.	2:36
	Retired General James Gavin: We should not be in Cambodia. If we try to wipe out all sanctuaries we will ultimately be in China. Expresses concern about military winning the show. The question should not be whether we will be humiliated but whether we are doing the right thing.	3:12

Date	Title	Min.:Sec.
	Collingwood: Introduces Nixon's view.	0:28
	President Nixon: North Vietnam is attacking Cambodia. Cambodia has asked for help.	0:48
	Collingwood: Cambodians are ill-prepared to resist on their own any determined assault by battle-hardened North Vietnamese or Viet Cong troops. Introduces Bert Quint.	0:20
	Bert Quint: Cambodians are gentle people more concerned with the land and their families than with killing. Cambodian government is teaching them to hate all Vietnamese. War is all around the Cambodians and is getting closer.	2:24
	Collingwood: Cambodians felt relatively secure until Sihanouk was deposed. Introduces Bernard Kalb.	0:16
	Bernard Kalb: War came quickly to Cambodia after being just outside of it for years. Created new alliances.	0:20
	General Lon Nol: Nixon is concerned with our neutrality as well as U.S. interests.	0:16
	Bernard Kalb: Recount of events in Cambodia since March and comments from a Cambodian man. Drive to end cult of Sihanouk and to drive out the Vietnamese communists. No distinction made by the people between local Vietnamese and Vietnamese communists. Local Vietnamese are being driven out and some killed.	3:32
	Collingwood: Introduces report from Bert Quint.	0:24

Date	Title	Min.:Sec.
	Bert Quint: Cambodian troops know where communists are but don't have the supplies or strength to attack them.	1:16
	Cambodian Man: We need help from any country.	0:28
	Bert Quint: Comparison of Cambodian forces with Viet Cong by numbers, training, and equipment. The Communist forces are far superior.	3:16
	Collingwood: Review of criticism on U.S. of Nixon's action.	1:10
	President Nixon: Political considerations were rejected on making decision.	0:32
	Dan Rather: President Nixon will not accept defeat but wants to get out of Vietnam. Has relied on small circle of advisers.	1:32
	Senator Hugh Scott: No resumption of bombing.	0:16
	Senator Fred Harris: Shocked reaction to sending of troops into Cambodia and resuming of bombing.	0:36
	Senator John Stennis: U.S. must have a military victory in Cambodia and perhaps may later move further north.	0:36
	Senator George Aiken: Senate Foreign Relations Committee wasn't consulted.	0:32
	Senator William Fulbright: Senate hasn't been treated fairly.	0:32
	Senator Mark Hatfield: Something positive must be done to offer the U.S. people and Congress an alternative—an opportunity to veto this war or confirm it.	0:24

Date	Title	Min.:Sec.
	Collingwood: Explanation of Hatfield amendment. Introduction of interview of Rogers by Kalb.	0:44
	Secretary of State Rogers: Cambodian operation going well but still too early to tell. Resumption of bombing is not a policy change. Explains why it is not. Reiteration of plans in Cambodia along with withdrawal of troops. Stresses time limit on operation made. President is aware of feelings of Senate Foreign Relations Committee before he announced his decision. Felt he had mentioned this possible plan in his appearance before the Committee.	4:04
	Collingwood: Late developments in Cambodia.	0:28
	Threlkeld: Report on fighting in Cambodia.	2:12
	Collingwood: Summary of action in Cambodia and its implications.	2:28
5/ 9/70	THE COLLEGES, CAMBODIA AND THE CONFRONTATION IN WASHINGTON	
	President Nixon: Students want peace, the same as I do.	0:40
	Cronkite: Rally in Washington for peace today by students. Recap of Nixon's speech and reactions to it.	1:20
	Schoumacher: Demands of demonstrators.	0:44
	Student: Blood is the price paid for disagreeing with Nixon's war policies.	0:32
	Dr. Benjamin Spock: What can we do to end the war now?	0.28

Date	Title	Min.:Sec.
	Labor Spokesman: Apology for construction workers in NYC and for George Meany.	0:44
	David Dellinger: Drop all charges against the Panthers.	0:32
	Coretta King: In agreement with demonstrators.	0:16
	Schoumacher: Description of activities in Washington.	1:20
	Cronkite: Nixon's ways of establishing communication with youth.	1:12
	Dr. Heard: There is a national crisis.	1:16
	Dr. Moos: A majority of students and faculty members are demonstrating and striking because of Cambodia.	0:40
	Demonstrators in Washington:	
	Martin Golub: Words have become meaningless.	0:20
	Bob Wallace: Objectives of President and students are not the same.	0:16
	Brian O'Leary: Feels he must protest and lobby.	0:16
	Brenda Shiggley: Will work for peace candidate.	0:08
	Richard Leathem: Confront the Administration with radical positions.	0:12
	Richard Woods: Gives reasons for being in Washington.	0:24

Date	Title	Min.:Sec.
	Jacqueline Wallinsky: U.S. is not the best of all possible places but can do something.	0:20
	Harvard professors	
	Thomas Schelling: Cambodian action is sickening.	0:12
	Francis Bator: President didn't consult with enough people. Discussion with Kissinger was painful. Thinks President needs legislative constraints.	1:12
	Richard Neustadt: Why they came to see Kissinger.	0:36
	Cronkite: Explanation of Moffett and introduction of Allen.	0:24
	Dr. James Allen: Strike on campus is very serious and will spread. Wants to see war ended so can use resources for other problems. May be more resignations. Will work within Administration to bridge communication gap with youth. President is listening now and thinks there will be a change.	3:00
	Robert White: Students are concerned about Cambodia. Was ready for a reaction to speech by students.	0:32
	Professor Thomas Moore: Moral failure of political leadership to respond to students that caused alienation.	0:52
	Professor William Jameskopf: Students are socially conscious. Pressure will be reduced if the war is eliminated.	0:48

Date	Title	Min.:Sec.
	Professor Harris L. Dante: Government does not listen.	0:24
	Professor Rauk: Students not acting with mature responsible actions.	0:44
	Student Anthony Parisi: Sick of violence and confused.	0:44
	Girl Student: Now willing to fight. Wants to change things, non-violently.	0:28
	2nd Girl Student: Students upset, even ones who were formerly apathetic.	0:40
	3rd Girl Student: Students want to be heard. Shooting at Kent State has widened communication gap.	0:32
	4th Girl Student: A possible revolution. War must be stopped.	0:16
	Student (Cleveland State): School should be open.	0:16
	Faculty Member: This scenario must stop.	0:12
	President Enarson: Because of student plebiscite, university will stay open.	0:48
	Cronkite: Describes events concerning New York City construction workers, police and peace demonstrators.	0:52
	Reagan: Great majority of students and faculty believe there is a better way than violence. Announces closing of schools.	1:12
	President S.I. Hayakawa: Worried by wave of hysteria in country. Students' reactions are understandable but not those of professors and presidents. Professors against Nixon are middle-aged adolescents. The captain should run the ship.	1:48

Date	Title	Min.:Sec.
	Cronkite: Discusses alleged statement by Finch about Agnew.	0:52
	Finch: Did not refer to Vice President in discussing language of high officials with students. Government needs a mechanism for communication with youth. Students committed to political action. Discusses forthcoming meeting of President Nixon and Governors.	2:44
	Dan Rather: Physical description of Washington. Comparison of antiwar demonstrations and Nixon's reactions changes in Nixon's image from first year.	2:20
	Hickel: Discusses decision to write letter and what he meant in letter.	2:44
	Cronkite: Discussion of student and congressional activity and international reactions. Report on action in Indochina.	2:44
	Sevareid: Comments on demonstration, problems of President, student feelings, and emotions of Americans to the crisis.	3:24
5/10/70	CAMPUSES IN CRISIS: THREE COLLEGE PRESIDENTS SPEAK	
	Reasoner: Introduction of presidents.	0:32
	Fleming: Three university presidents are representative of types of universities. Share same problems with most college presidents.	0:36
	Hesburgh: Worst crisis on campus, that he has ever seen. There is a crisis outside the university and the university has pulled together to do something about it.	1:32

Date	Title	Min.:Sec.
	Brewster: Crisis in university and outside is a cumulation of frustration of not being able to change any of the ills of society. This crisis has drawn the university together.	1:44
	Fleming: Large percentage of students concerned about Cambodia.	0:48
	Hesburgh: Closing of schools may have been most educative days in lives of students.	2:20
	Fleming: Being on trisemester makes the closing situation different.	0:20
	Brewster: Many options open to students regarding grades because of the closing. Would resist keeping schools shut down. Establishment must give students another way of being heard rather than shutting down.	1:00
	Fleming: We must speak out so as not to alienate a whole generation. Explains students' reasons for striking and the effect it has had.	1:19
	Hesburgh: Americans have stereotypes of students. Majority of students are frustrated, and should be active in the political process. The university must also be active.	2:28
	Brewster: Students are seriously questioning the system. The system must give a means for expressing this frustration. Believes in institutional neutrality but the members of the institution should express their convictions.	2:28
	Fleming: Students feel alienated.	1:00

Date	Title	Min.:Sec.
	Hesburgh: U.S. priorities are wrong and students recognize this. Older people can learn from younger people. Be glad youth is not apathetic.	1:44
	Brewster: Problem of preventing a riot at Yale for Black Panther Rally discussed. Police did a superb job. Has not faced question of calling in civil authorities to quell a riot.	2:00
	Fleming: No rule as to when to call police or National Guard.	1:00
	Hesburgh: President Nixon should listen to the students and there should be a mechanism set up for this purpose.	1:44
	Brewster: Nixon should talk about national interest not merely victory or defeat and also make the political process available to youth.	0:44
	Fleming: The credibility gap of the President can be cleared by actions not words.	0:28

ANALYSIS OF CBS NEWS SPECIAL: "THE SENATE AND THE WAR" JUNE 5, 1970

Date	Title	Min.:Sec.
6/5/70	"The Senate and the War"	
	Announcer: Introduction of participants.	1:20
	Sevareid: Background information on war.	1:16
	Dole: Satisfied with President's report.	0:16
	McGovern: Still thinks Cambodian action a mistake.	0:20
	Stennis: Satisfied with President's report.	0:16
	Cooper: Good report on a military operation.	0:16
	Gurney: Good report.	0:12
	Hughes: Successful militarily but not politically.	0:36
	Dole: Report showed potential of ARVN forces and a willingness to compromise with the Senate.	1:12
	Cooper: Interpretation of Cooper-Church Amendment.	0:52
	Stennis: Negative aspects of the amendment. Clarification of Byrd Amendment.	1:04
	Cooper: Byrd Amendment nullifies Cooper-Church.	1:20
	McGovern: Some Senators are trying to restore the power to the Congress that the Constitution intended. Discussion of this aspect.	2:00
	Gurney: Explains relationship of Presidential powers and war. Comments on Cambodian action.	1:52

Date	Title	Min.:Sec.
	Stennis: Discusses sovereignity of Cambodia. Senate should not try to limit battle field action.	1:28
	Cooper: Explanation of how amendment would not restrict President's power to protect troops, but the President should come to Congress if he is going to engage U.S. in war there.	1:08
	Dole: President should be able to take immediate action to protect troops. Therefore, there is no harm in the Byrd Amendment.	0:45
	Cooper: Supports the President in his Vietnamization program but doesn't want to expand the war.	0:52
	McGovern: It is a violation of the Constitution if the President can freely commit American ground forces. Explains objective of Cooper-Church Amendment.	1:32
	Gurney: Discusses President's new policy in Southeast Asia. Enumerates Nixon's efforts to achieve peace.	1:08
	Hughes: Byrd Amendment renders Cooper-Church Amendment useless. Cambodia is an extension of the war. Vietnamization will not end the war. Supports troop withdrawals but is aware of political connotations. The Congress doesn't have as extensive use of the media as the President does. War should be brought to a scheduled end.	3:32
	Dole: Hopes Republicans win the Senate. Everyone wants the war ended. Praises Nixon and asks for support.	1:24
	Stennis: Discusses both amendments and battle field.	1:40

Date	Title	Min.:Sec.
	Cooper: Explains amendment again. Believes President will have troops out by June 30. Amendment based not on mistrust of President but on trust in Congress.	2:28
	McGovern: Cambodian action has been a military success, but we have doubled the area we have to pacify if the South Vietnamese troops don't come out; that will slow down efforts to pacify Vietnam.	1:20
	Gurney: Doesn't double the area of the war as McGovern said. In the past, the U.S. has made the broad decisions of the war not the Vietnamese. Gives examples of this.	1:40
	Hughes: Nixon now pledges to end the war rather than win the peace. Vietnamization is an extension of fighting. War will only be ended by political settlement. Congress should reassert its Constitutional rights.	3:08
	Stennis: The President is not after military victory. Debate in Congress over the war should have been held in 1954, '55, '56.	1:40
	Gurney: Vietnamization is working.	1:32
	Dole: President and other Senators support general intent of Cooper-Church Amendment but it must have a provision in it so as not to impair the right to protect American troops.	1:28
	McGovern: Survival of our Constitutional and political system is at stake, if we continue in the war. Congress must face up to its responsibilities.	1:44

Date	Title	Min.:Sec.
	Dole: Explains change in Cambodian situation from April 20 to April 30. All want peace.	0:56
	Stennis: American people do want to get out of Vietnam, but want the President to have the authority to protect troops.	1:12
	Gurney: Polarization is out of perspective. Before Cambodia, people were pleased with the President and the majority still support him.	1:28
	Hughes: Moral fiber of people in the country has been rented over the war. U.S. has resources to cope with problems once the war is over. Must unite the country again. All want war ended but are divided on means. Elections should reflect will of people.	2:00
	Dole: Kansas is not being torn apart by the war. We are in Cambodia to protect American troops.	0:24
	Cooper: Approves of Guam Doctrine and explains effect of Cooper-Church Amendment on the doctrine.	1:28
	Gurney: Military budget has been cut and amounts spent on other problems are increasing.	1:52
	Stennis: Restricting the President might wreck the progress made so far.	0:24
	Hughes: U.S. is still increasing involvement in the war.	0:24
	McGovern: Still not near a settlement of the war.	0:16
	Sevareid: This war has been widely disputed. Argument is not ended, nor has the war.	0:40

ANALYSIS OF CBS REPORTS COVERAGE OF INDOCHINA WAR AND DOMESTIC REACTION NOVEMBER 1969 - MAY 1970

Date	Title	Min.:Sec.
12/2/69	A TIMETABLE FOR VIETNAM	
	President Nixon: By December 15, 60,000 men will have been withdrawn. Eventual withdrawal of all forces on a timetable.	0:44
	President Thieu: In 1970, South Vietnamese will replace most of U.S. fighting troops. Can't say when nor number for replacement.	0:20
	Vice President Ky: In 1970, 150,000 U.S. troops can be withdrawn.	0:16
	Colonel Mayer: Major part of South Vietnamese armed forces will be trained by end of 1970, except for mechanics and pilots.	0:16
	Major Hung: Two to Three years before Vietnamese Air Force has trained fighter pilots.	0:12
	General Young: Fighter pilots completely trained by mid-1972.	0:08
	Colonel Hayes: In three years South Vietnamese Army could be one of most effective in Southeast Asia.	0:12
	U.S. Secretary of State Rogers: Reversal of policy troops are being withdrawn, Vietnamizing the war.	0:28

Date	Title	Min.:Sec.
	Collingwood: A timetable does exist. CBS poll shows Americans want withdrawal. 79% believe it will take two years or more to withdraw. Saw impressive signs of progress in Vietnam this past time—Saigon alive at night; bombed buildings rebuilt; refugees returned to villages; countryside open to travel; roads open.	5:24
	Major Denis Finley: "Highway 30" closed for seven years; opened about September therefore, people able to come home.	0:40
	Lieutenant Tony McLean: Opening of "Highway 30" brought people back. South Vietnamese unit can keep road open.	0:44
	Richard Roberts, district adviser: Primary allegiance of people is to the land. Some allegiance for South Vietnam government, but more will come later.	1:04
	Collingwood: Villagers, by accepting weapons from government of South Vietnam, is a kind of political allegiance. South Vietnam increasing its strength in Mekong Delta, a former Viet Cong area. No U.S. foot soldiers in Delta ARVN has taken over.	5:04
	1st Lieutenant Donald Borgo: ARVN has improved 100%, but weak small unit leadership.	0:32
	General Hoang: Militarily, South Vietnam can hold its own.	0:20

Date	Title	Min.:Sec.
	Colonel John Hayes: South Vietnamese soldiers are different from U.S. soldiers but are capable in their own way. M-16 rifles have also helped South Vietnamese soldiers. In three years the ARVN will be one of the most effective armies in Southeast Asia.	2:16
	Collingwood: Official line: Vietnamese can do the job. ARVN rated at 90% of its goal of expansion and modernization. Air Force is only at 50% of its projected strength. Inter-dependence between Vietnamese and U.S. in the Delta air war.	2:28
	Major Hung: Vietnamese pilots are trained in U.S. In two to three years Vietnamese Air Force can carry on war without U.S. help.	0:32
	Collingwood: Major Hung's squadron is self-sufficient. No U.S. help; only U.S. planes.	1:20
	General Young: Vietnamese Air Force has good, professional pilots.	0:32
	Collingwood: VNAF is best of Vietnamese Armed Forces but doesn't have enough people. Takes two years to train an aircraft mechanic. Bien Hoa airbase shows progress and problems. Mechanics must be taught English first.	2:25
	Colonel Edward Mayer: Need more English teachers but are well trained and well equipped.	0:52
	Collingwood: U.S. has given equipment. Now must teach maintenance. If U.S. leaves "by plane and boat", South Vietnam would collapse. Probable timetable given. Does not guarantee survival of Saigon government, but gives it a chance to survive. Must broaden governmental support.	3:20

Date	Title	Min.:Sec.
	Colonel Nguyen Be: Hamlet training program is a step toward democracy. By more training, people will identify with Saigon government.	0:24
	Collingwood: Identification of people with Saigon government is the key to survival. President Thieu realizes that winning people is as important as winning battles. Visits a village and acts as a politician.	4:25
	President Thieu: Government will help but the people will do everything themselves.	0:28
	Collingwood: Neither Thieu nor the NLF have a wide base of public support.	1:20
	President Thieu: Have made progress and is pleased with it. Will take more responsibility. U.S. people should give Nixon time to Vietnamize the war. U.S. involvement in Vietnam will have been good or bad depending on how the U.S. leaves.	1:32
	Collingwood: Aim of U.S. has been to let South Vietnam determine its own future. Slow timetable might allow this. Both U.S. and South Vietnam agree it is now time for U.S. to leave. There is a fighting chance the timetable can work. South Vietnamese will now have to do most of the fighting.	2:04
	President Kennedy: South Vietnam government must win popular support for the war if it is to be won. It is their war and only they can win it or lose it.	0:28

ANALYSIS OF WHO, WHAT, WHEN, WHERE, WHY COVERAGE OF INDOCHINA WAR AND DOMESTIC REACTION NOVEMBER 1969 - MAY 1970

Date	Title	Min.:Sec.
3/10/70	LAOS: AMERICA'S NOT-SO-SECRET WAR IN ASIA	
	Collingwood: Situation in Laos.	0:32
	Secretary of State Rogers: President's position in Laos.	0:24
	Senator Stuart Symington: Undisclosed war in Laos is very dangerous.	0:24
	Collingwood: Story of American involvement in Laos.	0:56
	President Nixon: No American's in Laos on combat basis.	0:28
	Collingwood: Alteration of President's previous statement and implications of situation in Laos.	2:04
	President Kennedy: Laos must remain neutral.	0:28
	Collingwood: History of Laos and U.S. involvement there.	2:36
	Bernard Kalb: Situation in Laos now.	1:04
	Fred Branfman: Refugee situation in Laos.	1:08
	Ambassador Godley: No commitment in Laos but military assistance and material is being supplied.	0:28

Date	Title	Min.:Sec.
	Timothy Allman: Report on Long Chen, a CIA-supported base for guerrilla operations and other bases.	1:24
	Bernard Kalb: Description of U.S. involvement, Laotians and Vientiane. Discussion of implications.	2:52
	Collingwood: Introduce Souvanna Phouma.	0:32
	Prince Souvanna Phouma: Laos has asked and used American support. Duty of U.S. to protect Laos from being overrun.	1:08
	Senator Symington: Need our money for problems at home not in Laos.	0:20
	Senator Fulbright: Afraid of deeper involvement.	0:16
	Senator Scott: Need air commitments to Laos to protect U.S. troops in Vietnam.	0:40
	Senator McGovern: Not all right to start in Laos as we did in Vietnam.	0:32
	Senator Cooper: Should get out of Laos. The risk is too great.	0:24
	Collingwood: Wrap-up of situation in Laos and its implications.	1:40

ANALYSIS OF 60 MINUTES COVERAGE OF INDOCHINA WAR AND DOMESTIC REACTION NOVEMBER 1969 - MAY 1970

Date	Title	Min.:Sec.
1/ 6/70	Reasoner: Combat art and poetry.	6:15
5/12/70	Wallace: Interview with Walter Hickel and family about Hickel letter to the President.	20:30
	Wallace: During interview with John Mitchell, Mitchell plays down influence over decision to go into Cambodia.	1:00
5/26/70	Wallace: Discussion between Attorney Frank McGee and author Seymour Hersh on publicity versus fair trial for those accused in My Lai incident.	12:18

ANALYSIS OF FACE THE NATION COVERAGE OF INDOCHINA WAR AND DOMESTIC REACTION NOVEMBER 1969 - MAY 1970

Date	PARTICIPANTS	Min.:Sec.
11/ 2/69	Guest: Senator Russell Long Reporters: George Herman, Marya McLaughlin Walter Mears (Associated Press)	3:20

No comment on President's forthcoming speech on Vietnam. If we can't fight to win we should get out, either in a hurry or in phased-out operation. Admires Vice President and agrees with substance if not language of his criticism of war dissenters; men in field deserve a strong U.S. position at negotiating table.

11/ 9/69	Guest: Senator John Stennis Reporters: George Herman, Steve Rowan Peter Lisagor (*Chicago Daily News*)	4:40

Doubtful about Vietnamization program but willing to give it a try. Doubts combat troops can be out by end of 1970; air support would still be needed. Moratorium marches can be hindrance to speedy withdrawal by publicizing division over war.

Date	PARTICIPANTS	Min.:Sec.
11/16/69	Guest: Herbert Klein Reporters: George Herman, Robert Pierpoint Richard Harwood (*Washington Post*)	15.00

Value of Washington demonstrations lies in showing we are a country where dissent can be expressed; government policy cannot be made on streets. "Silent Americans" should speak out, so Hanoi isn't deluded about public opinion. Government obviously did not oppose dissenters but cooperated with them. Greater show of unity could bring peace quicker. Polls indicate support of President. Moratorium leaders did good job of policing demonstrators; but there are dangers from numbers of people in emotional atmosphere. (Rest of broadcast on Vice President Agnew's speech.)

11/30/69	Guest: Senator George McGovern Reporters: George Herman, Bruce Morton Nick Kotz (*Des Moines Register & Tribune*)	13:00

My Lai incident has shown true face of war. Lt. Calley could be used as symbol of collective national guilt; bombing villages as bad as close-range murder. Should disengage completely in a year. Plans resolution to set up committee to study all causes and procedures in getting into Vietnam; Symington committee studying involvement in Laos and Thailand. Fears emphasis on silence; debate needed. Large marches self-defeating in repeti-

Date	PARTICIPANTS	Min.:Sec.
	tion; local political action needed; but sees no national third party growing out of peace movement.	
12/14/69	Guest: Dr. Milton Eisenhower Reporters: George Herman, Hal Walker Richard L. Strout (*Christian Science Monitor*)	
	My Lai incident does not necessarily indicate inherent violence in American character; brutalizing effects of war.	2:00
	Reaction to Moratorium Day march depends on where you were: looked violent inside Justice Dept.; from perspective of Baltimore majority seem peaceful.	1:40
	Nixon's statement about watching football during mobilization probably misconstrued; merely meant White House knew facts of public reaction and march would not provide additional evidence.	1:12
1/ 4/70	Guest: Senator Fred Harris, Chairman Democratic National Committee Reporters: George Herman, David Schoumacher Paul Hope (*Washington Star*)	4:12
	Doubt that Vietnamization program can work; prefers to call it "de-Americanization." Vietnam war definitely an issue but a party one; looking forward to Fulbright hearings. Favors more rapid troop withdrawal as advocated by Clark Clifford.	

Date	PARTICIPANTS	Min.:Sec.
1/11/70	Guest: Secretary of Defense Melvin Laird Reporters: George Herman, Steve Rowan Charles W. Corddry (*Baltimore Sun*)	
	Discussion of figures on troop reduction leading to possible volunteer force in Vietnam in 1971.	1:40
	Manpower cuts depend on rate of Vietnamization; General Abrams to make decision. Forthcoming trip to Vietnam: survey of South Korean forces; possibility of My Lai-type atrocities involving Koreans.	5:30
2/ 1/70	Guest: Vice President Spiro Agnew Reporters: George Herman, Bruce Morton Hugh Sidey (*TIME Magazine*)	4:40
	Denies statements on Asian trip shifted emphasis of Nixon Doctrine away from self-reliance; situation in Thailand conforms to Doctrine. Troop withdrawal will proceed as fast as capability of ARVN permits; small North Vietnam victories should not be blown up out of proportion by media.	
2/ 8/70	Guest: Senator Charles Goodell Reporters: George Herman, David Schoumacher Walter Mears (Associated Press)	8:00
	Bill to cut off funds for war would publicize determination to get out of Vietnam; Javits opposed. War a mistake; we should withdraw	

Date	PARTICIPANTS	Min.:Sec.

all military personnel. President's Vietnamization plan open to "veto" by North Vietnam and Thieu government. Approves Nixon Doctrine for Southeast Asia. President could be defeated on war issue.

3/ 1/70 Guest: Charles Mathias Jr., Maryland 13:20
Reporters: George Herman, David Schoumacher
Philip Potter (*Baltimore Sun*)

President probably sympathetic to Mathias-sponsored resolution to repeal Gulf of Tonkin and other resolutions on Presidential powers for war and approving Vietnam withdrawal policy. War in Laos not so secret; aftermath of Geneva Accords. Possibility of triggering massive North Vietnamese invasion of Laos, and position of Thais. Congress getting more information on situation from reporters than from the government.

3/ 8/70 Guest: Senator Mike Mansfield 23:00
Reporters: George Herman, Marvin Kalb
Peter Lisagor (*Chicago Daily News*)

Not satisfied with President's statement on Laos; Plain des Jarres a separate operation; in favor of getting out of Laos entirely; involvement could slow down troop withdrawal from Vietnam. Vietnam solution must eventually include all of Southeast Asia.

Date	PARTICIPANTS	Min.:Sec.
3/15/70	Guest: Senator Stuart Symington Reporters: George Herman, Marvin Kalb Marquis Childs (*St. Louis Post-Dispatch*)	13:00

Definitely in a war in Laos; Asian war is diverting money needed at home and elsewhere; Middle East more important to our security than Asia; believes in negotiation rather than Vietnamization. "Shoddy" and classified story about money paid to Philippine government for troops to fight in Vietnam.

4/26/70	Guest: Senator Robert Griffin Reporters: George Herman, David Schoumacher Richard Stewart (*Boston Globe*)	14:30

Would back President on limited military assistance to Cambodia; opposes Goodell amendment tying President's hands; Cooper amendment provides flexibility. "Wouldn't be surprised" if there were new chief negotiator appointed to Paris.

5/ 3/70	Guest: Vice President Spiro Agnew Reporters: George Herman, Bruce Morton Peter Lisagor (*Chicago Daily News*)	23:00

Bombing of North Vietnam "protective reaction." Necessity for going after Cambodian sanctuaries now to safeguard American troops in South Vietnam. Same argument doesn't apply to North Vietnam because DMZ is short-

Date	PARTICIPANTS	Min.:Sec.
	er line at greater distance from Saigon and capable of defense by South Vietnamese forces. Members of Congress were informed of President's decision. U.S. not under any obligation to defend Cambodian government. North Vietnamese capability greatly diminished.	
5/10/70	Guest: Anthony J. Moffett and Charles Palmer Reporters: George Herman, David Schoumacher Haynes B. Johnson (*Washington Post*)	18:00
	Palmer: Demonstration showed public opposition to invasion of Cambodia. Young people beginning to find such demonstrations boring; will probably turn to political action. Nonviolent tactics certainly preferable. Only one person who refused to sign statement calling for impeachment of Nixon after Cambodia. Movement does include blacks. Congress evaded responsibilities in Cambodian situation. Education leaders would not have taken strong stands without impetus from student strikes.	
	Moffett: Hopes resignation will help improve communication between Administration and young. Believes President has stopped direct Administration attacks on young; young people have felt there was a policy of repression. Young people feel lack of good leaders; they need help and courage from their leaders, which Nixon has failed to give them. Public has responsibility, should not leave everything up to educators and Congressmen. Young people have made a start, raised issues.	11:30

Date	PARTICIPANTS	Min.:Sec.
5/17/70	Guest: Senator Mike Mansfield Reporters: George Herman, John Hart Warren Weaver (*New York Times*)	
	Senate amendment concerning troops in Cambodia is measure to support President, not show distrust, to ensure he does what he says he'll do. House should also act; Senate must and will take action on repealing Gulf of Tonkin, debating constitutional powers of Commander-in-Chief, on defense bill. Troops should be out of Cambodia by June 30 and let South Vietnamese take over all future action. Even if successful, Cambodia venture was failure in extending war, going into neutral country. U.S. should not act if Cambodia goes communist; problem for South Vietnamese and Thais.	14:00
	Cambodian move will not bring Hanoi to peace table. Young people ought to work in politics to reinvigorate system.	4:00
	Disagrees with President over world peacekeeping role for U.S. Southeast Asia not vital to U.S. security. Troops should be out by end of year.	3:30
5/24/70	Guest: Herbert Klein Reporters: George Herman, Dan Rather Philip Potter (*Baltimore Sun*)	12:00
	"Very significant" numbers of troops will be withdrawn from Vietnam by end of year. Vice President Ky a man who speaks his own	

Date	PARTICIPANTS	Min.:Sec.

mind "Wouldn't rule out" possibility of air support for South Vietnamese operations in Cambodia. Administration making efforts to approach youth on campuses; commission to be appointed to study Kent State tragedy; Hickel not necessarily a member.

5/31/70 Guest: Robert W. Haack 2:30
Reporters: George Herman, Mike Stanley

Eilene Shanahan (*New York Times*) Cambodia and Vietnam both factors in Stock Market performance. Business leaders at White House meeting reassured on troop withdrawal schedule.

WCBS-TV EXHIBIT

WCBS-TV SIX O'CLOCK REPORT
MARCH, APRIL, MAY 1970

	Mins:Secs
Monday, March 2, 1970	
Jensen: Mike Mansfield says situation in Laos is worsening. Big bombing in Mekong Delta. N. Vietnamese blew up bridge across National Highway 1.	00:30
Tuesday, March 3, 1970	
Jensen: Troop withdrawal from Vietnam (70,000). Defense Secretary Laird denial; Senator McGovern charges subterfuge.	00:30
Kalb: Vietnam peace talks might be stopped. (Material furnished by CBS News.)	01:30
Wednesday, March 4, 1970	
Jensen: Pre-trial hearings for five Marines charged with murder of 16 Vietnamese. Mendel Rivers contends U.S. is deepening military involvement in Laos. Fullbright "scared to death" Laos more important to U.S. than Vietnam. Secretary Rogers testified before Senate Committee.	00:30
Kalb: Congress and Press put pressure on Nixon administration for facts on Laos. (Material furnished by CBS News.)	01:30
Thursday, March 5, 1970	
Jensen: Combat deaths in Vietnam were 113, highest figure in three months. Americans wounded lowest in two years.	00:30

Mins:Secs

Thursday, March 5, 1970 (Continued)

Threlkeld: National Assemblyman Tran Ngoc Chau was convicted for ten years at his second military trial. 03:10
(Material furnished by CBS News.)

Jensen: Senator McGovern made appeal for facts about Laos. 00:20

Friday, March 6, 1970

Jensen: Nixon made a "precise description" of level of U.S. involvement in Laos. 00:40

Jensen: Casualties. 00:20

McLaughlin: Prince Souvanna Phouma asks U.S. for better weapons. Effects of bombing on Laos. 02:30
(Material furnished by CBS News.)

Monday, March 9, 1970

Jensen: Enemy mortar misses most of its target. Laos responds to cease-fire proposals. 00:40

Jensen: Army formally charges sergeants with larceny at Long Binh. 00:20

Tuesday, March 10, 1970

Jensen: Captain Medina charged with four counts of murder for My Lai massacre. 00:40

Jensen: Pentagon reveals U.S. troops in Laos got combat pay since 1966. 00:20

Jensen: Laotians wait for peace proposal. 01:40

Wilson: Senator Javits discusses whether facts on Laos are being kept from American public.

Wednesday, March 11, 1970	Mins:Secs
Jensen: 20,000 students rioted in Phnom Penh, Cambodia.	00:25
Jensen: Souvanna Phouma welcomed by Pathet Lao for cease fire and negotiations.	00:20
Wilson: Senator Case wants no more involvement in Asia. (WCBS-TV Film Report)	00:30
Barker: Widow of Captain says husband died in Laos. (KRLO-TV News film furnished by CBS News.)	01:10
Jensen: Low American losses in Vietnam; stumble on Communist supply bases.	00:20
Thursday, March 12, 1970	
Jensen: Laos discussed at Paris peace talks.	00:20
McLaughlin: Pathet Lao troops move within striking distance of Royal Laotian capital. (Material furnished by CBS News.)	02:58
Jensen: Number of wounded in Vietnam high.	00:20
Sargent: Big outbreak of fighting in Vietnam "Operation Phoenix". (Material furnished by CBS News.)	01:00
Friday, March 13, 1970	
Jensen: Sihanouk in Moscow. Cambodia asks Hanoi, Viet Cong and USSR withdrawal.	00:30
Jensen: 16 helicopters lost in Vietnam; 10 Americans killed.	00:20

	Mins:Secs
Friday, March 13, 1970 (Continued)	
McLaughlin: U.S. destroys USSR-built helicopter in Laos. (Material furnished by CBS News.)	02:15
Jensen: Senator Fullbright discusses Laos with newsman.	00:59
Saturday, March 14, 1970	
Jensen: 3 bombs explode in Saigon.	00:20
Monday, March 16, 1970	
Jensen: Two American seamen granted asylum in Cambodia.	00:30
Jensen: Secretary Rogers in private testimony on Laos. 50 Americans killed in Laos.	00:30
Tuesday, March 17, 1970	
Jensen: Charges against 14 officers for My Lai massacre.	00:40
Osborne: First Lieutenant Louis Font seeks discharge from Army—conscientious objector to Vietnam war. (WCBS-TV Film report.)	02:00
Jensen: Scattered fighting in Vietnam. N. Vietnamese seize two hilltop positions.	00:30
Jensen: Mansfield speaks against troops in Laos. (Material furnished by CBS News.)	02:00
Jensen: N. Vietnamese refuse to withdraw troops from Cambodia. Sihanouk in Moscow.	00:20
Wednesday, March 18, 1970	
Jensen: Prince Sihanouk ousted.	01:15
Kalb: In Laos, U.S. base overrun by Communists.	03:05

Wednesday, March 18, 1970 (Continued)	Mins:Secs
Jensen: Knowlton appointed to West Point Command. (Material furnished by CBS News.)	02:00
Thursday, March 19, 1970	
Jensen: U.S. recognizes new Cambodian regime.	00:45
In Paris, U.S. accused of engineering coup.	00:30
Laos situation confused.	00:45
Laird says U.S. should continue Laos bombings; may announce more troop withdrawals in April.	01:00
Vietnam casualty rates up, General Ramsey wounded.	01:00
Beebe: 200 arrested for blocking draft board door. (WCBS-TV film report.)	00:30
Syracuse demonstrators seek arrest. (WCBS-TV film report.)	01:00
Demonstration in several cities.	00:30
Friday, March 20, 1970	
Jensen: New Cambodian government proclaims martial law.	00:20
Sargent: North Vietnamese attack Laos. (Material furnished by CBS News.)	01:50
Jensen: 10 killed, 31 wounded in Vietnam.	00:20
Saturday, March 21, 1970	
Jensen: Sihanouk warned against returning to Cambodia.	00:20

Mins:Secs

Monday, March 23, 1970

Jensen: In Southeast Asia, Cambodia's new government is tightening its grip after deposing Prince Sihanouk. 00:20

Jensen: General Knowlton becomes Superintendent of the U.S. Military Academy after Major General Koster was charged in connection with My Lai massacre. (WCBS-TV film report.) 02:10

Tuesday, March 24, 1970

Jensen: Former Army Sergeant West testified before a Senate Subcommittee on any possible relationship between marijuana use and the My Lai massacre. 00:40

Jensen: Ousted Prince Sihanouk has urged his supporters in Cambodia to wage guerilla warfare against the rightest government. 00:30

Threlkeld: American troops in Tay Ninh Province in South Vietnam ordered to avoid border incidents involving Cambodia. (Material furnished by CBS News.) 02:45

Jensen: In Laos, Communist forces have asked Prince Souvanna Phouma to call an unconditional halt to American bombing. 00:20

Wednesday, March 25, 1970

Jensen: Ground fighting in Vietnam is scattered; 2 Marine Cobra gunships collided. 00:30

Jensen: Long Binh court martial of Lt. James Duffy. Pentagon denies troops at My Lai under influence of marijuana. 00:25

	Mins:Secs
Thursday, March 26, 1970	
Jensen: American jets crossed the Cambodian border to bomb North Vietnamese and Viet Cong troops. Casualties.	00:20
McLaughlin: Vietiane undisturbed by fighting. (Material furnished by CBS News.)	01:50
Friday, March 27, 1970	
Jensen: Cambodia's capital of Phom Penh is surrounded by tanks and troops. Hanoi backs a return of Sihanouk to power.	01:00
Saturday, March 28, 1970	
Jensen: White House says U.S. military commanders in South Vietnam sometimes move troops across the border in Cambodia in response to enemy attacks.	00:25
Monday, March 30, 1970	
Jensen: Civil war may be developing in Cambodia.	00:30
McLaughlin: North Vietnamese troops in Laos tried to take a hilltop position overlooking the Laotian and CIA headquarters in Long Cheng. (Material furnished by CBS News.)	02:00
Jensen: South Vietnamese Rangers and armored units have been pulled out of positions along the Cambodian border.	00:40

Mins:Secs

Tuesday, March 31, 1970

Jensen: U.S. command in Saigon disclosed that a Navy jet shot down a Russian-built MIG 21 over North Vietnam. Court martial of Lt. Duffy sentenced him to 6 months of confinement. Viet Cong and some North Vietnamese support Sihanouk's return to power in Cambodia. 00:40

Jensen: Nixon will have announcements on troop withdrawals from Vietnam. 00:15

Wednesday, April 1, 1970

Jensen: S. Vietnam heaviest attack in seven months. General William Bond casualty. 00:30

Jensen: Senator McGovern asks for immediate withdrawal. 01:04
(Material furnished by CBS News.)

Jensen: Cambodia new government complaint on N. Vietnam troops crossing border. 00:30

Jensen: Captain Medina charged. 00:30

Thursday, April 2, 1970

Jensen: Twelve Weathermen indicted in Chicago. 00:40

Jensen: Vietnam war, the constitutionality of—challenged by Governor Sargent (Mass.). 00:30

Jensen: March for Victory Committee, Carl MacIntire—principal organizer—anti-war march Vietnam. 01:30
(Material furnished by CBS News.)

Jensen: Vietnam—two-day wave of heavy enemy mortar. 00:30

Thursday, April 2, 1970 (Continued) Mins:Secs

Jensen: Secretary of State Rogers states to Senate Foreign Relations Committee that Nixon administration has no intention of getting involved in Cambodia. 00:30

Quint: Cambodia—hundreds of political prisoners released. 02:00
(Material furnished by CBS News.)

Friday, April 3, 1970

Jensen: Vietnam—American Infantry fighting Northwest of Saigon. American patrol collided with North Vietnamese. 00:10

Saturday, April 4, 1970

Jensen: Vietnam—North Vietnamese troops in Laos have attacked a former U.S. air strip and supply base at Sam Thong. In Vietiane, Premier Prince Souvanna Phouma met with Neutralist and Rightest leaders. In Cambodia, government closed universities to give military training to students. 00:40

Monday, April 6, 1970

Jensen: Vietnamese troops (3,000) rushed to relieve Americans at Dak Seang. 00:30

Jensen: China's Premier Chou En Lai charged U.S. engineered recent overthrow of Cambodia's Neutralist Prince Sihanouk. 00:30

Shepard: Sihanouk's successors are moving quickly to strengthen their position. 01:26
(Material furnished by CBS News.)

Mins:Secs

Tuesday, April 7, 1970

Jensen: North Vietnamese troops continue to apply heavy pressure to Green Beret camp at Dak Seang. Cambodia reports it used Russian-built MIGS to help battle Viet Cong forces. 00:40

Quint: Cambodia's new leaders are mobilizing and arming their forces. 01:37
(Material furnished by CBS News.)

Wednesday, April 8, 1970

Jensen: Vietnam—seige of Dak Seang past the crucial period. The Columbia Eagle was released today by Cambodia. 00:40

Thursday, April 9, 1970

Jensen: Vietnam—Nixon will make a nationwide report to update U.S. policy in Vietnam. In Vietnam enemy gunners shot down a U.S. medical evacuation helicopter at Dak Seang. Last week 138 Americans lives lost. 00:45

Jensen: In Paris today Philip Habib warned Viet Cong they are jeopardizing peaceful settlement. In Cambodia Vietnamese Communists pushing west. 00:30

Quint: Reports on transition in Cambodia from Phnom Penh. 02:17
(Material furnished by CBS News.)

Friday, April 10, 1970

Jensen: Army ordered hearings against Captain Medina re My Lai massacre. 00:25

Jensen: In Vietnam, the ten-day seige broken at Dak Seang. 00:25

Friday, April 10, 1970 (Continued) Mins:Secs

Jensen: Texas billionaire H. Ross Perot continues pressure on Hanoi to alleviate American P.O.W.'s. 01:40
(Material furnished by CBS News.)

Jensen: More than 1,000 South Vietnamese troops fought inside Cambodia in the Parrot's Beak area. More than 70 men, women, and children reportedly massacred by Cambodian troops. 01:40
(Material furnished by CBS News.)

Saturday, April 11, 1970

Jensen: In Vietnam, pre-dawn flight of B-52's unloaded 540 tons of bombs near Dak Seang. 00:45

Monday, April 13, 1970

Jensen: Downtown Saigon came under rocket attack for the first time nearly four months today. 00:30

Jensen: Last week in Vietnam a company of air cavalrymen were ordered into a jungle near Tay Winh to block escape of a North Viet force. The men balked but an officer praised them. 02:40
(Material furnished by CBS News.)

Jensen: President Nixon talked with Pentagon top brass over Viet Nam report he will deliver to nation Thursday. 00:40

Jensen: Cambodia army rushing reinforcements to Svay Rieng. 00:20

Quint: More than half million Vietnamese live inside borders of Cambodia. 01:20
(Material furnished by CBS News.)

	Mins:Secs
Tuesday, April 14, 1970	
Jensen: Cambodia's Premier Lon Nol today appealed for outside help.	00:30
Jensen: In Vietnam Dak Seang continues under siege.	00:31
Jensen: Captain Ernest Medina questioned for two hours re massacre at My Lai.	00:15
Jensen: Citizens Commission on U.S. war crimes in Vietnam talked of "electrical torture procedures". (WCBS-TV film report.)	02:01
Jensen: Seaman Priest courtmartial opens.	00:20
Wednesday, April 15, 1970	
Jensen: Anti-war moratorium demonstrators march.	08:00
Penza with a team of reporters. (WCBS-TV film report.)	
Jensen: The Mekong River in Cambodia is a sea of bodies today.	01:25
Jensen: Captain Ernest Medina suspended today. (Material furnished by CBS News.)	01:27
Jensen: Goodell calls for national referendum on Vietnam.	00:15
Jensen: Vietnam veterans turn in medals.	00:15
Thursday, April 16, 1970	
Jensen: In Cambodia Viet Cong attacked capital of Takeo. In today's fighting 1200 South Viet troops helicoptered.	00:30

	Mins:Secs
Friday, April 17, 1970	
Jensen: In the provincial capital of Takeo in Cambodia, a new massacre of Vietnamese civilians.	00:45
Jensen: In Washington a White House spokesman says there has been no official word on such massacres.	00:25
Kalb: Reports from Pnom Penh. (Material furnished by CBS News.)	02:00
Saturday, April 18, 1970	
Jensen: Cambodia reports that Viet Cong forces have surrounded the capital of Takeo.	00:30
Monday, April 20, 1970	
Jensen: In Cambodia, Viet Cong troops continue to hold the town of Siang.	00:16
McLaughlin: Reverend Richard Fernandez talks about Premier Pham Van Dong of North Vietnam. (Material furnished by CBS News.)	01:54
Jensen: In Paris, top Viet Cong delegate rejects French proposal.	00:22
Tuesday, April 21, 1970	
Benton: President Nixon's decision to withdraw an additional 150 thousand troops from Vietnam, but some questions were raised by Senator Muskie of Maine. (Material furnished by CBS News.)	02:22

Mins:Secs

Tuesday, April 21, 1970 (Continued)

Jensen: In Paris, a spokesman for Viet Cong delegation to peace talks termed President Nixon's announcement "a maneuver aimed at fooling public opinion". Mr. Nixon "prolonging military occupation of South Viet Nam and preventing any progress at Paris talks". 00:30

Jensen: In Cambodia, South Viet continue to operate in Savy Rieng. 00:50

Wednesday, April 22, 1970

Jensen: Four planes lost over Laos. 00:15

Jensen: New York second in combat dead, N.J. 11, Conn. 29. 00:20

Jensen: South Vietnam troop actions in Cambodia. 00:30

Jensen: Father Berrigan and Eberhardt extradited to Maryland on charge of burning draft records. 00:45

Jensen: Coffin case dismissed in Boston. 00:20

Jensen: Sharp losses on Wall Street laid to Southeast Asia. 00:35

Thursday, April 23, 1970

Jensen: President orders phase out of draft deferments, Assistant Secretary Kelley discusses reasons for volunteer army. 03:13
(Material furnished by CBS News.)

Jensen: White House comments on supplying Cambodia with AK 47's. 00:30

Thursday, April 23, 1970 (Continued)	Mins:Secs
Jensen: Cambodian troops putting up little resistance.	00:30
Jensen: Casualty figures.	00:30
Jensen: Communist negotiators reject President's peace appeal.	00:30
Friday, April 24, 1970	
Jensen: Ziegler says President concerned over forty thousand North Vietnamese in Cambodia.	00:45
Quint: Report from Saang. (Material furnished by CBS News.)	01:50
Hebert: Stony Brook students stage hunger strike to protest defense contracts. (WCBS-TV Film report.)	02:10
Saturday, April 25, 1970	
Ubell: News analysis: Effect of Chinese satellite on defense budget.	01:20
Jensen: Rogers speech accuses North Vietnam of violating international accords in Cambodia.	00:30
Jensen: Cambodia rushed reinforcements into highway junction.	00:15
Monday, April 27, 1970	
Jensen: Sihanouk calls for defeat of U.S.	00:30
Jensen: President has not reached decision of supplying arms to Cambodia; Senator Scott favors, Mansfield does not.	01:00

Mins:Secs

Tuesday, April 28, 1970

Jensen: Cambodian troops led by paratroopers opened a drive to re-take the Viet Cong—held Ang Tassom, 40 miles south of Pnom Penh. 00:40

Hart: Barry Goldwater in Cambodia. 01:15
(Material furnished by CBS News.)

Jensen: At Paris Peace Talks, Viet Cong Foreign Minister says Sihanouk's associations with Communist leaders laid the legal basis for North Vietnamese intervention in Cambodia. 00:20

Jensen: Senate Foreign Relations Committee hearing on the impact of the Viet Nam war in the nation's cities. 01:40
(Material furnished by CBS News.)

Jensen: Draft call up but will go down when Vietnamization takes effect. 00:30

Wednesday, April 29, 1970

Rowan: Thousands of South Vietnamese troops launched a major strike across the Cambodian border. 01:00
(Material furnished by CBS News.)

Jensen: Nixon will broadcast tomorrow about Cambodian crisis. Senators voice their views on Cambodia developments. 01:30
(Material furnished by CBS News.)

Thursday, April 30, 1970

Threlkeld: South Vietnamese and American troops try to wipe out Communist bases in Cambodia. 01:40
(Material furnished by CBS News.)

Thursday, April 30, 1970 (Continued)

	Mins:Secs
Jensen: Nixon has more information on Cambodia but some senators disagree with him. (Material furnished by CBS News.)	01:05
Jensen: Wounded in Vietnam were the highest toll in a single week since last September.	00:20

Friday, May 1, 1970

Jensen: Cambodian campaign report.	01:00
Jensen: President confers with Laird and joint chiefs, briefs newsmen. (Material furnished by CBS News.)	05:00
Jensen: Congressional reaction to Cambodia: Fulbright, Mansfield, Scott, Goodell, Hatfield, Griffin, Ottinger. (Material furnished by CBS News.)	04:20
Jensen: Silent Majority Mobilization Committee says move will save American lives.	00:15
Jensen: Student reaction.	00:30
Jensen: President calls most "kids . . . greatest", talks of "these bums blowing up campuses".	00:30
Jensen: Moscow May Day salutes "heroes of Vietnam", does not mention Cambodia.	00:30
Jensen: Fragile calm returns to Ohio State.	00:30
Jensen: President agrees to meeting with Senate Foreign Relations Committee.	00:30
Jensen: Sluggish trading as market falls ascribed to Cambodia.	00:30

	Mins:Secs
Saturday, May 2, 1970	
Jensen: North Vietnam claims U.S. planes bombed two provinces, Pentagon indicates strikes against AA batteries.	01:00
Jensen: Laird discusses bombing at news conference.	00:30
Jensen: Cambodian campaign report.	00:30
Jensen: Mansfield, Fulbright, other senators on upcoming meeting with President. (Material furnished by CBS News.)	01:10
Rich: Loyalty Day Parade report. (WCBS-TV film report.)	02:00
Monday, May 4, 1970	
Jensen: Four students killed at Kent State.	01:00
Potts: Campus reaction NYU, Columbia. (WCBS-TV film report.)	05:22
Jensen: Princeton, Rutgers reaction.	00:20
Jensen: Raids over North Vietnam and Kosygin reaction and Chinese.	01:15
Quint: Cambodia operations. (Material furnished by CBS News.)	02:19
Jensen: Senate Foreign Relations Committee and Javits comments on Cambodia. (WCBS-TV film report.)	02:29
Jensen: Apparent uncertainties over Cambodia send stocks spiraling downward.	00:30

Tuesday, May 5, 1970	Mins:Secs
Jensen: Kent station update.	02:15
Jensen: Washington reactions to Kent State.	01:00
Jensen: Reactions at Washington U., Berkeley, San Francisco, University of Buffalo, City College.	01:15
Rich: NYU demonstrations include Guerilla theatre. (WCBS-TV film report.)	02:00
Potts: Live interview with Dr. Andrew Cordier, president of Columbia.	04:00
Potts: Classes suspended at Columbia to protest South East Asia policy. (WCBS-TV film report.)	03:30
Jensen: Demonstrations at High School of Music and Art, James Madison High School, Sheepshead Bay High School, UN Headquarters.	01:00
Osborne: Analysis of local demonstrations.	01:45
Kalb: Cambodian campaign status, Cambodian troops prepare for showdown 30 miles from Pnom Penh.	02:58
Wednesday, May 6, 1970	
Jensen: President orders staff investigation of Kent State, announces news conference.	00:45
Jensen: Mansfield urges high level commission.	00:20
Potts: Local schools react to Kent State. (WCBS-TV film report.)	04:00
Rich: Seton Hall demonstration results in 23 injuries. (WCBS-TV film report.)	02:30

	Mins:Secs
Wednesday, May 6, 1970 (Continued)	
Jensen: Four fires at Stoneybrook campus.	00:30
Jensen: Plans for mass demonstration in Washington.	00:30
Jensen: Austin, Texas, University of California, Kent State status.	00:30
Hebert: Memorial service for Kent State victim in home town, Plainview, L.I. (WCBS-TV film report)	02:40
Jensen: Cambodian campaign.	01:00
Syvertsen: Report on some casualties in Cambodia. (Material furnished by CBS News.)	02:30
Jensen: House leaders back President's move into Cambodia.	00:30
Jensen: Laird reiterates aim to get out of Cambodia as quick as we can.	00:30
Jensen: June draft call 15,000.	00:15
Jensen: Communists to boycott Paris talks.	00:30
Jensen: Salt talks proceed despite hints that Cambodia might hinder negotiations.	00:30
Jensen: Lindsay speech says majority for peace.	00:30
Thursday, May 7, 1970	
Jensen: White House reports capture of major base complex.	00:30
Jensen: Eight university presidents called to White House.	00:30
Jensen: President summons governors for Monday.	00:30

Thursday, May 7, 1970 (Continued)	Mins:Secs
Jensen: Anthony Moffett resigns.	00:30
Jensen: City schools to close in honor of Kent State victims.	00:30
Penza/Lindstrom: Funeral service for Jeffrey Miller, Kent State victim. (WCBS-TV film report)	06:00
Potts: Demonstrations in various schools and colleges in City.	05:00
Jensen: Washington demonstration plans develop.	01:00
Jensen: Cambodian and Vietnam campaigns.	02:00
Quint: Cambodian troops use tanks for first time. (Material furnished by CBS News.)	02:15
Jensen: House defeats effort to cut off funds for Cambodia.	00:30
Rich: Julliard School of Music students stage peaceful demonstration at Lincoln Center to honor victims of war.	02:30
Friday, May 8, 1970	
Jensen/Rich/Beebe: Hardhats invade Wall Street demonstration on City's day of reflection. (WCBS-TV film report)	09:00
Jensen: Peaceful demonstrations elsewhere in City. (WCBS-TV film report)	01:00
Rojas: Poignant demonstration at Queens high school. (WCBS-TV film report)	05:15

	Mins:Secs
Friday, May 8, 1970 (Continued)	
Jensen: "Peace Now" march in Columbus.	00:30
Jensen: Kent State quiet.	00:30
Jensen: President of University of Wisconsin resigns.	00:30
Jensen: Police and students clash at Buffalo.	00:30
Jensen: 250 colleges closed.	00:20
Saturday, May 9, 1970	
Sefton/Osborne: Thousands mass in Washington.	05:00
Jensen: President meets protestors at monument.	00:30
Jensen: Finch critizes Agnew for heating up climate.	00:30
Rich: Anti-war rally in Brooklyn. (WCBS-TV film report)	01:30
Jensen: Mass. State representative who drafted Constitutionality Bill suicide.	00:20
Jensen: Mayor meets with police, deplores hard-hat attacks, police failures.	00:30
Jensen: Allied force sweeps along Mekong River.	00:30
Monday, May 11, 1970	
Beebe: Construction workers take to streets again. (WCBS-TV film report)	03:00
Jensen: PBA head attacks Mayor's criticism of police at Friday demonstration. (WCBS-TV film report.)	03:08

Monday, May 11, 1970 (Continued)

	Mins:Secs
Penza: Police commissioner said to be near resigning.	03:00
Jensen: Senator Young urges Guard lieutenant's arrest.	00:30
Jensen: Kleindeinst says Guard should not be armed with live ammo.	00:30
Jensen: 450 Colleges on strike; San Diego student immolation; Denver University arrests; Colgate students demand Secretary Rogers resign.	01:00
Jensen: City University, NYU sit-ins continue.	00:45
Potts: Report on other local school demonstrations. (WCBS-TV film report.)	03:00
Jensen: Armada sweeps up Mekong.	00:20
Jensen: Arms cache found in Fishhook.	00:20
Jensen: Rockets fired in Saigon.	00:30
Jensen: Rhieu says troops will go into Cambodia whenever Saigon thinks it necessary.	00:30
Jensen: Phouma announces counter-attack.	00:20
Jensen: President meets with 46 governors.	00:45
Jensen: Congressman Koch meets with Brandeis students. (WCBS-TV film report.)	01:15
Hart: Interview with Governor Sargent on death of Shea. (Material furnished by CBS News.)	

Mins:Secs

Monday, May 11, 1970 (Continued)

Jensen: Senate Foreign Relations Committee votes to floor bill forbidding further military action in Cambodia. 00:30

Jensen: Agnew *TV Guide* article criticizes networks. 00:30

Jensen: Wall Street awaits South East Asia developments. 00:30

Tuesday, May 12, 1970

Jensen: Laird tells Senate Armed Forces Committee Vietnamization ahead of schedule. 00:30

Jensen: Gavin testifies before Foreign Relations Committee. 01:54
(Material furnished by CBS News.)

Jensen: Ottinger and 50 State Legislators call for New York war referendum. 00:30

Jensen: Naval developments on Cambodian Coast, Mekong, Tonkin Gulf. 00:30

Potts: Confrontation between students and hardhats on Wall Street. 04:00
(WCBS-TV film report.)

Jensen: National Silent Majority Committee calls for Lindsay impeachment. 02:00
(WCBS-TV film report.)

Jensen: Students boycott classes in City schools; demonstrations in Albany, Columbia, S.C., and Ohio University, Athens. 00:50

	Mins:Secs
Wednesday, May 13, 1970	
Jensen/Quint: Cambodian campaign. (Material furnished by CBS News.)	04:30
Jensen: Cooper-Church Debate begins; author David Schoenbrun testifies before Senate Foreign Relations Committee. (Material furnished by CBS News.)	02:00
Jensen: Rogers states no support to Cambodian government except limited arms.	00:30
Jensen: Ohio National Guard renews allegation of sniper fire at Kent State.	00:30
Rabel: Calm restored at University of South Carolina.	01:46
Jensen: National Guard on Denver campus.	00:30
Jensen: Suspect arrested in blaze at Institute for Defense Analysis, Princeton.	00:30
Jensen: Students demand shut down at Fairfield University.	02:30
Rojas: Report on NYU strike. (WCBS-TV film report.)	02:30
Jensen: College unrest cuts short term for David and Julie Eisenhower.	00:30
Jensen: Hickel comments on letter cautioning against alienating the young.	00:45
Thursday, May 14, 1970	
Jensen: Market reaches seven-year low due to worry over economy and Indochina.	01:15
Jensen: Laird, Kissinger, and Richardson tell GOP senators they oppose efforts to restrict Cambodian involvement.	00:30

	Mins:Secs
Thursday, May 14, 1970 (Continued)	
Jensen: Percy, Mansfield call for debate on role of President and Congress in conducting war.	00:30
Jensen: Senator Kennedy predicts Senate approval of Cooper-Church, comments on Rogers statements re support of Cambodian government. (WCBS-TV film report.)	02:00
Hart: Senator Tower comments on Senate debate outcome.	01:55
Jensen: President tells Medal of Honor winners nation will look back and honor Vietnam veterans.	00:30
Jensen: Casualty figures.	00:30
Jensen: No progress at peace talks.	00:30
Jensen: 11th offense launched in Cambodia.	00:20
Jensen: Ohio Guard readied in Athens. Colonel Fassinger maintains sniper shot at Guard at Kent State.	00:30
Jensen: Support the war labor rally planned.	00:30
Friday, May 15, 1970	
Jensen: Guard ordered to seal off Athens, Ohio Campus.	00:30
Jensen: AP says 14 colleges shut down.	00:20
Jensen: Demonstrations at Sheepshead Bay H.S., Board of Ed.	01:00
Beebe: Support war rallies in Manhattan. (WCBS-TV film report.)	05:00

	Mins:Secs
Friday, May 15, 1970 (Continued)	
Jensen: President says Congress would limit ability to protect American troops.	00:30
Rather: Speculation on President's Florida trip. (Material furnished by CBS News.)	01:15
Jensen: Mansfield predicts Cooper-Church success.	00:30
Jensen: Lomphat attacked; Ho Chi Minh Trail in Laos bombed.	00:30
Jensen: Japan ready to assist civilians in Cambodia.	00:15
Saturday, May 16, 1970	
Jensen: Kompong Chan surrounded; American base assaulted.	00:30
Jensen: Jakarta conference on Cambodia begins.	00:15
Jensen: Church accuses White House of massive pressure; Mansfield predicts victory.	00:30
Jensen: Armed Forces Day Parade proclaims patriotism. (WCBS-TV film report.)	01:10
Jensen: Rockefeller speaks on Indochina.	00:30
Beebe: Violence erupts in anti-war demonstration at Fort Dix. (WCBS-TV film report.)	03:00
Monday, May 18, 1970	
Jensen: Laird admits American advisers with South Vietnamese in Laos.	00:30

	Mins:Secs
Monday, May 18, 1970 (Continued)	
Hart: Senators Dole and Church interviewed on effect of amendment. (Material furnished by CBS News.)	01:35
Penza: Javits position on Cambodia. (WCBS-TV film report.)	03:15
Jensen: Cambodian campaign.	01:00
Jensen: Pope decries U.S. involvement in Indochina.	00:30
Jensen: Kent State coroners report, investigation.	00:30
Jensen: University of Mass. move to impeach president. (Material furnished by CBS News.)	01:40
Jensen: Student and hardhat confront each other in dialogue from EYE ON NEW YORK. (WCBS-TV film report.)	08:30
Tuesday, May 19, 1970	
Penza: Preparations for pro-war rally. (WCBS-TV film report.)	02:50
Jensen: President meets with Congressional leaders, Senator Scott reports. (Material furnished by CBS News.)	01:15
Jensen: Mansfield accuses administration of violating spirit of Laos ban.	00:30
Jensen: Cambodian campaign.	00:45
Jensen: Mitchell calls this semester history's saddest.	00:30

Tuesday, May 19, 1970 (Continued)	Mins:Secs
Jensen: Whitney Young scores President's epithets to youth.	00:30
Sefton: Precautions against violence at tomorrow's pro-war rally. (WCBS-TV film report.)	03:00
Jensen: Candlelight demonstration at Brooklyn College. (WCBS-TV film report.)	01:00
Wednesday, May 20, 1970	
Jensen: Senate debate on amendment heats up.	00:45
Jensen: Troops use bicycle for relaxation.	00:15
Jensen: American ships join Cambodian along Coast.	00:30
Jensen: Mao declared Indochina brings danger of world war.	00:30
Thursday, May 21, 1970	
Jensen: Fresh troops were ordered onto Hamburger Hill today.	00:40
Friday, May 22, 1970	
Jensen: In Washington, the debate over Cambodia continued today. Defense Secretary Laird said that South Vietnamese troops should not be held to any strict timetable of withdrawal.	00:30
Jensen: Cambodian troops shelled Tonle Bet today.	00:25
Jensen: The American military said today that U.S. helicopter gunships accidentally fired on South Vietnamese marines in Cambodia today.	00:15

Mins:Secs

Friday, May 22, 1970 (Continued)

Wilson: Rumbles of dissatisfaction with Nixon's Cambodian policy growing among Republican leaders in New Jersey. (WCBS-TV film report.) 02:12

Young: Student protest against the war is taking a new direction that has some politicians worried. 02:00

Saturday, May 23, 1970

Jensen: Two South Vietnamese task forces converged today from two directions against a North Vietnamese regiment on Cambodian rubber plantation. 00:22

Spence: Demonstrations for and against administration policies; anti-war march by present-day Angels of Mercy. (WCBS-TV film report.) 02:00

Wilson: The situation in Cambodia may play a decisive role in the local election campaigns in New York. (WCBS-TV film report.) 01:32

Monday, May 25, 1970

Jensen: President re-affirmed his decision to pull all American forces out of Cambodia by June 30. 00:22

Jensen: Senator Edward Kennedy, Senate majority leader Mansfield and Averell Harriman criticize President's Indo-China policy. 00:42

Jensen: Secretary of State William Rogers predicts Nixon Cambodia decision courageous. 00:20

	Mins:Secs
Monday, May 25, 1970 (Continued)	
Jensen: Thousands of Communist troops reported moving deeper into Cambodia.	00:30
Syvertsen: Cambodian farmers caught in the middle. (Material furnished by CBS News.)	01:26
Tuesday, May 26, 1970	
Jensen: Senate produced some action on the controversial Cooper-Church amendment.	00:25
Jensen: Comments on today's vote—Senators Church, Baker, and Griffin. (Material furnished by CBS News.)	01:36
Jensen: Democratic senatorial hopeful Theodore Sorensen cites 1787 State Law that gives State right to intervene on sending its citizens to an undeclared war.	00:22
Penza: Sorensen interview. (WCBS-TV film report.)	01:18
Jensen: In Cambodia today, American troops came under attack in area of Mimot.	00:21
Jensen: Housing Secretary George Romney says America's intervention in Vietnam was a mistake.	00:36
Wednesday, May 27, 1970	
Jensen: Defense Secretary Melvin Laird predicted Nixon's announced withdrawal of 150,000 troops from Vietnam may be met and surpassed by next spring.	00:10

Mins:Secs

Wednesday, May 27, 1970 (Continued)

Jensen: Speaking at a seminar in Washington, Laird said that Nixon doctrine working out as planned. 01:22
(Material furnished by CBS News.)

Jensen: The Senate debate on Cambodia continued today. 00:25

Jensen: American warplanes have struck inside North Vietnam for the first time in three weeks. 00:25

Jensen: In Cambodia, South Vietnamese troops have opened a new offensive near Takeo. 00:15

Jensen: South Vietnamese and Cambodian foreign ministers agreed to resume full diplomatic relations after a 5 year break. 00:22

Thursday, May 28, 1970

Jensen: The Senate today agreed to vote next Wednesday on what may prove to be a test of strength of the Cooper-Church amendment. 00:30

Jensen: Speaking last night at a fund raising dinner in Boston, former Ambassador Goldberg called for an end to fighting in Indochina. 01:00
(Material furnished by CBS News.)

Jensen: Diplomatic source in Phnom Penh said today that Nixon used hot line to inform Moscow that American troops were invading Cambodia. 00:30

Jensen: The toll of American battlefield deaths dropped last week. 00:25

	Mins:Secs
Thursday, May 28, 1970 (Continued)	
Jensen: Communist forces stepped up the fighting in the northern provinces of South Vietnam today.	00:20
Jensen: In Cambodia, Communist troops also went on the offensive.	00:30
Jensen: Cambodia today agreed to resume diplomatic relations with Thailand.	00:20
Friday, May 29, 1970	
Jensen: In Cambodia, a thousand South Vietnamese marines tried to cut their way through a North Vietnamese blocking force to raise the seige of Prey Veng.	00:30
Jensen: In Saigon, student demonstrators disrupted the funeral cortege of Phan Suu.	00:25
Kalb: In China, mass demonstrations to protest the American presence in Cambodia have been organized throughout the country. (Material furnished by CBS News.)	01:50
Jensen: Two infantry officers, Capt. Hartman and Lt. Lee, were charged by the Army with attempted murder for ordering their men to fire into Vietnamese huts.	00:15
Jensen: Hartman's father and Lee's mother were interviewed. (Material furnished by WDAU-TV and KTTS-TV.)	01:30

Saturday, May 30, 1970

	Mins:Secs
Jensen: In South Vietnam, Viet Cong forces mounted a heavy attack on the highland resort town of Dalat.	00:30
Barnow: More than ten thousand anti-war demonstrators staged a Memorial Day peace march down Fifth Avenue. (WCBS-TV film report.)	02:36

OTHER WCBS-TV INFORMATIONAL BROADCASTS NOVEMBER 1969 - MAY 1970

PUBLIC HEARING (Debates on Public Issues)

November 2, 1969

"The War in Vietnam"—Is there a difference between the position of the Johnson and Nixon administrations?

Congressman Allard K. Lowenstein (D-5 N. Y.)
Congressman Lowell P. Weicker, Jr. (R-4 Conn.) 28:00

February 15, 1970

"President Nixon's Asian Policy"—Is the administration committed to withdrawing U.S. forces from Vietnam?

Congressman Edward I. Koch (D-Lib.-17, N. Y.)
Robert W. Duemling, Special Assistant Secretary of State for Eastern Asia and Pacific Affairs. 28:00

NEWSMAKERS (News Interview Series)

One or more questions on Southeast Asia and related topics were addressed by newsmen from WCBS-TV or the press to the indicated guest on the following broadcasts:

November 23, 1969

Senator Jacob K. Javits (R-N. Y.)

December 7, 1969

Senator Harrison A. Williams (D-N. J.)

February 8, 1970

Senator Jacob K. Javits (R-N. Y.)

April 12, 1970

Senator Charles E. Goodell (R-N. Y.)

April 19, 1970

Congressman Richard L. Ottinger (D-25 N. Y.)

May 17, 1970

Theodore Sorenson, Candidate for Democratic nomination for United States Senate from New York.

May 31, 1970

Paul O'Dwyer, candidate for Democratic nomination for United States Senate from New York.

HELP COMES FLYING (Documentary)

Tuesday, March 11, 1969

This broadcast traced an airlift operation supplying blood to area soldiers in Vietnam.

WCBS-TV CAMPAIGN DEBATES NOVEMBER 1969 - MAY 1970

Mins:Secs

Sunday, May 24, 1970

Richard D. McCarthy, Paul O'Dwyer, Richard Ottinger, Theodore Sorensen (N.Y. Democratic Senatorial Candidates)

Jerome Wilson (WCBS-TV Political Editor)

Wilson: Nixon has termed the action in Cambodia as necessary to hasten the end of the Vietnam war.	00:10
Ottinger: I think getting involved in a land war in Asia was the biggest mistake the U.S. ever made.	00:50
Sorensen: U.S. participation in the war in Indochina should be ended.	00:46
O'Dwyer: How long can we stand idly while the President dishonors the country?	00:15
Sorensen: There is slaughter going on in Vietnam.	00:20

Sunday, May 31, 1970

James Scheuer and Jacob Gilbert (22nd N.Y. Congressional District Candidates—Democrat)

Jerome Wilson (WCBS-TV Political Editor)

Wilson: What are your comments on Vietnam war?	00:10
Scheuer: We should get out of Cambodia immediately; Vietnamization policy is a fraud.	00:30
Gilbert: I am unalterably opposed to the war in Cambodia.	00:15

Sunday, May 31, 1970

Mins:Secs

James Quaremba and Nelson Gross (N.J. Republican Candidates for Senate)
Jerome Wilson (WCBS-TV Political Editor)

Wilson: Address yourselves to the administration's policy in Indochina. 00:10

Quaremba: It would suggest disunity to vote against the Cooper-Church amendment. 00:20

Gross: I am in favor of Vietnamization of the war. 00:30

WCBS-TV EDITORIALS AND REPLIES
DECEMBER 16, 1969 - JUNE 4, 1970

Subject	Spokesman	Broadcast
YEAR END: VIETNAM (Editorial)	Robert O'Neil for WCBS-TV	December 16, 1969 6:55 PM
YEAR END: VIETNAM 2 (Reply)	William Ward National Chairman of American Friends of Vietnam	January 5, 1970 6:55 PM
POMPIDOU VISIT—ARMS (Editorial)	Michael Keating for WCBS-TV	March 2, 1970 11:25 PM
LAOS (Editorial)	Robert O'Neil for WCBS-TV	March 14, 1970 6:55 PM
TROOP WITHDRAWALS (Editorial)	Michael Keating for WCBS-TV	March 30, 1970 11:25 PM
TROOP WITHDRAWALS 2 (Reply)	Joanna Misnik, New York Coordinator of the Student Mobilization Committee to End the War in Vietnam	April 13, 1970 11:25 PM
SMALL FAVORS (Editorial)	Robert O'Neil for WCBS-TV	April 23, 1970 11:25 PM
TROOP WITHDRAWALS 3 (Reply)	Charles Wiley, Newsman and Executive Director of the National Committee for Responsible Patriotism	April 27, 1970 11:25 PM
CAMBODIA (Editorial)	Robert O'Neil for WCBS-TV	May 1, 1970 6:55 PM
CHANGE IN TONE (Editorial)	Robert O'Neil for WCBS-TV	May 9, 1970 6:55 PM

Subject	Spokesman	Broadcast
TOLERANCE AND DISSENT (Editorial)	Peter Kohler for WCBS-TV	May 14, 1970 6:55 PM
SMALL FAVORS 2 (Reply)	William B. Seebeck Press Secretary of the National Student Coordinating Committee for Freedom in Vietnam and Southeast Asia	May 15, 1970 11:25 PM
CAMBODIA 2 (Reply)	Charles Wiley, Newsman and Executive Director of the National Committee for Responsible Patriotism	May 18, 1970 6:55 PM
COOPER-CHURCH AMENDMENT	Robert O'Neil	May 19, 1970 6:55 PM
SOUTH VIETNAM AND CAMBODIA	Robert O'Neil	May 29, 1970 11:25 PM
NIXON SPEECH	Peter Kohler	June 4, 1970 11:25 PM

WCBS-TV EDITORIAL

CHANNEL 2, 51 WEST 52 STREET
NEW YORK, N.Y. 10019

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Alan P. Sloan, Vice President
General Manager, WCBS-TV

Subject: YEAR END: VIETNAM

Spokesman: Robert O'Neil

Broadcast: December 16, 1969
6:55 PM

This is another in our editorial series assessing the decade of the sixties, and looking ahead to the seventies. Vietnam is tonight's subject.

In the final year of the sixties we have watched a new administration trying to disengage the United States from the decade's great tragedy, the Vietnam War.

We believe that the year has shown that the Nixon administration by now has a plan for this purpose and is following it. But from what we can see, the plan will fall short of thoroughly disengaging the country from the unsound position we have taken up in Vietnam and Southeast Asia.

President Nixon can claim considerable short-term progress. The withdrawal by April fifteenth of another 50,000 troops, announced last night, will mean that American fighting forces in Vietnam will have been cut by about 20 per cent since he came into office. These phased troop withdrawals, combined with a new military strategy to minimize our casualties, and a new draft law to take

WCBS-TV Editorial—Continued

some of the edge off student protestors, all suggest that the administartion is making progress with the problem, both at home and abroad.

And the administration has a strategy, too, for dealing with the North and South Vietnamese. Although Mr. Nixon denies downgrading the peace negotiations, he has clearly shifted his hopes away from them and over to his program of Vietnamization. And here, in our opinion is where the Nixon plan falls short. Because even though Washington succeeds in replacing all American ground combat forces with South Vietnamese in one or two years, this country probably will continue to be called upon to provide artillery, air and other support, involving perhaps as many as 200,000 men.

These men would be used to prop up Saigon's over-taxed combat forces, and to curtail North Vietnamese infiltration, for which no solution has been found to date.

American action against infiltration carries the danger in the '70s of increased American operations elsewhere in Southeast Asia because the infiltration routes pass through Laos and Cambodia.

So all in all, the Nixon program is a welcome change of direction in Vietnam, but, in our opinion, it still does not offer a satisfactory disengagement.

WCBS-TV EDITORIAL REPLY

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Alan P. Sloan, Vice President
General Manager, WCBS-TV

Subject: YEAR END: VIETNAM 2

Spokesman: William Ward

Broadcast: January 5, 1970
6:55 PM

(WCBS-TV said the Nixon administration's Vietnam policy was a welcome change of direction but did not yet seem to offer a satisfactory disengagement from our present unsound position in Vietnam and Southeast Asia. Here with another point of view is William Ward, National Chairman of American Friends of Vietnam.)

In a recent editorial, WCBS-TV criticized President Nixon's program for the phased withdrawal of American troops from Vietnam as "inadequate," mainly because the plan contemplates the indefinite retention of some American forces in that country, and in the words of WCBS-TV "fall(s) short of thoroughly disengaging the (United States) from the unsound position we have taken up in Vietnam and Southeast Asia."

This criticism makes sense only if one accepts the premise that our whole interest and involvement in Southeast Asia has been a mistake; and that we should, therefore, cut our losses and run. I for one profoundly disagree with this premise, and I believe that a majority of my fellow citizens do, as well.

WCBS-TV Editorial Reply—Continued

We are in Southeast Asia to serve several vital objectives: to safeguard for the people of South Vietnam the right to determine their own political future; to prevent a dangerous shift in the Asian balance of power in favor of Red Fascism; to vindicate the reliability of those United States military and political commitments all over the world—in NATO, in Latin America, in the Middle East as well as in Southeast Asia. One of the most persuasive arguments that we are pursuing a wise and necessary course in that part of the world is the fact—so infrequently mentioned by the news media—that every Southeast Asian country (excepting only the Communist regime in North Vietnam) supports the American presence in the region, with varied degree of open commitment.

One may reasonably argue about the management of the struggle in South Vietnam over the past several years. One may reasonably debate whether we should have tried to "Vietnamize" the struggle long ago; or conversely whether President Nixon is now trying to do too much, too rapidly in an effort to hasten the withdrawal of American troops. Some American forces will be required for a time in South Vietnam, in Southeast Asia as a whole, and in Europe under NATO. They will be there to defend the vital interests of the United States.

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Alan P. Sloan, Vice President
General Manager, WCBS-TV

Subject: POMPIDOU VISIT—ARMS

Spokesman: Michael Keating

Broadcast: March 2, 1970
11:25 PM

During his visit to the United States French President Georges Pompidou has been hard pressed to justify the sale of 110 Mirage jet fighter planes to Libya.

Of course, the French government has a rationale for this transaction, based chiefly on the alleged need to fill a power vacuum in North Africa, where France has historic interests.

But at the end of the chain of reasoning, we suspect, is a characteristic Gallic shrug. After all, the Frenchman might say, if France doesn't sell jets to Libya, somebody else will.

That observation is depressingly true. The Libyan case is a fairly typical example of the universal pattern of arms-peddling by the industrialized nations to the non-industrialized.

Where opportunism and greed is so prevalent, almost nobody has the right to point the accusing finger at anybody else.

WCBS-TV Editorial—Continued

Yet both the United States and France, if they are honest with themselves, should feel a special sense of responsibility.

The United States is responsible, because it has set the pace. Over the past 25 years, we have given away or sold arms totaling by one estimate $50 billion, more than three times the amount exported by the rest of the world put together. Today, we are still the world's largest munitions merchant, with about 40 per cent of the market.

France is responsible too, because lately it has become one of the most aggressive and cynical of the arms peddlers. According to one estimate, only the Americans and Russians outsell the French in this deadly line of merchandise. But what is more disturbing is the repeated disregard Paris has shown for international efforts to keep arms out of areas of crisis—whether it's the Middle East, or the Nigerian civil war, or the Greek-Turkish dispute over Cyprus. Similarly French salesmanship has done a lot to undermine Washington's efforts to persuade Latin American countries to keep down their defense budgets in the interests of regional peace and economic development.

Maybe the visit of Mr. Pompidou is a good occasion for the United States and France to think about the roles they are playing in this insane world-wide arms race. And maybe this is the time for Washington and Paris to begin to work together toward an arms policy more consistent with those ideals of reason and humanity on which both countries were founded.

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Alan P. Sloan, Vice President
General Manager, WCBS-TV

Subject: LAOS

Spokesman: Robert O'Neil

Broadcast: March 14, 1970
6:55 PM

In his statement on Laos March sixth, President Nixon described two basic missions that American planes are now performing there. One is interdiction—that is, the blocking of the flow of North Vietnamese troops and supplies travelling to South Vietnam over the Ho Chi Minh trail in southeastern Laos.

The other mission is air support for the Laotian army in the north, far from the infiltration routes. There our planes are flying not only reconnaissance but combat support missions. Their purpose is, and I quote the President: "to help prevent the recognized Laotian government from being overwhelmed by larger Communist forces dominated by the North Vietnamese," unquote.

It is this second category of air strikes that has seriously escalated lately in response to dramatic gains by the Communists in the northern area, gains which for the first time in years are threatening the Laotian government itself. Reports of saturation bombing by American B-52s in this area have prompted fears that the Nixon adminis-

WCBS-TV Editorial—Continued

tration might be adopting the discarded Johnson strategy of escalation, and drifting into a second war in Southeast Asia before it has gotten itself out of there first.

Mr. Nixon says this isn't so. But we find it hard to be reassured. Reliable reports indicated that we have been bombing Laos in 1970 as heavily as we bombed North Vietnam in early 1968, and that last year's air losses over Laos may have been as many as one hundred men and three hundred planes. And this is quite apart from reported American casualties and American clandestine operations on the ground, which the President did not mention in his March sixth statement.

In the opinion of WCBS-TV, the United States must sharply limit its involvement in Laos. Only carefully controlled air strikes to interdict the Ho Chi Minh supply line are justified, because they cover the withdrawal of American troops from South Vietnam. Otherwise this country has no national interest in any other kind of military involvement in Laos. As we have said before, we believe that the American attempt to fight Communist expansion in both Laos and Vietnam was a mistake and not worth the cost. The order of the day now should be to disengage ourselves rapidly from these countries, not get in deeper.

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Alan P. Sloan, Vice President
General Manager, WCBS-TV

Subject: TROOP WITHDRAWALS

Spokesman: Michael Keating

Broadcast: March 30, 1970
11:25 PM

In a few weeks it will be April 15, which President Nixon designated several months ago as the completion date for the latest installment in the withdrawal of American troops from South Vietnam. On that date the authorized strength of our forces there will stand at 434,000.

That figure, as the administration is continually reminding us, represents a 20 percent drop from the maximum troop level of the Johnson period. We are duly impressed, or at least we were back in December. But 434,000 is still an awfully big number. And it is a number that is becoming a bit shopworn, even though it was dusted off for presentation to Congress and the people by the President and the Secretary of Defense in their reports on the progress of Vietnamization. Of course, they had a lot of other brand-new figures. They spoke in glowing terms of the percentage of air sorties now flown by the South Vietnamese air force, the reduction in the percentage of Vietcong among the enemy forces, the number of weapons we have supplied to the self-defense forces in the South Vietnamese villages.

WCBS-TV Editorial—Continued

But they had nothing new to say about American troop withdrawals.

The silence on that score is getting louder and louder, and we wonder whether the staged withdrawal program has slipped the President's mind. Perhaps the new communist threat to Laos, and/or the political upheaval in Cambodia are giving the administration second thoughts about the withdrawal schedule.

Perhaps Washington fears that if we remove any more of the props that support Saigon, the dominoes in Southeast Asia will start to fall.

In the opinion of WCBS-TV, the administration has hardly begun to reduce our excessive large presence in South Vietnam. If it is going to slow up already, then it can hardly be said to have a withdrawal program worthy of the name.

It's time for the President to come up with the next phase of his withdrawal program. And never mind those dominoes.

WCBS-TV EDITORIAL REPLY

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Alan P. Sloan, Vice President
General Manager, WCBS-TV

Subject: TROOP WITHDRAWALS 2

Spokesman: Joanna Misnik

Broadcast: April 13, 1970
11:25 PM

(WCBS-TV called upon the Nixon administration to announce the next stage of its reduction of America's excessively large military presence in South Vietnam, since the current stage will be completed as of April 15. Here with another point of view is Joanna Misnik, New York Coordinator of the Student Mobilization Committee to End the War in Vietnam.)

On March 30, WCBS-TV presented an editorial opinion in which they expressed doubt about the credibility of Nixon's phased withdrawal program in Vietnam and called upon the President to implement it by announcing new withdrawals.

It is quite clear that Nixon's so-called withdrawals have not in any way affected the military balance in Vietnam. The current troop level is close to that prevailing during the Spring of 1968. In other words, the war goes on as before. Vietnamization is a smokescreen—an attempt to fool the American people into thinking the war is ending

WCBS-TV Editorial Reply—Continued

while the war is acutally expanded into Laos and Cambodia behind the backs of the public.

The Student Mobilization Committee puts no credibility whatsoever in any so-called phased withdrawal plans of this administration. Our demand is clear: the immediate, total, unconditional withdrawal of all U.S. forces from Vietnam and the rest of Southesat Asia. The Vietnamese and all Southeast Asians have a right to determine their own future without any interference from the U.S.

We know the vast majority of the American people want this war ended now and the GIs brought home. Not some GIs—but every last one now. We are tired of paying 30 billion dollars for a war we don't want through increasing inflation, taxes, and lack of social services.

On April 15, tax day, the antiwar movement will not be listening for a new announcement of a few thousand GIs from Nixon. Instead on April 15 we are calling a day of mass demonstrations to demand an end to this war. In New York, activities will culminate in Bryant Park between 4 and 6 PM for a giant antiwar rally. That's our answer to Nixon. Join us on April 15. For more information, contact, Student Mobilization Committee, 15 East 17th Street, 675-8465.

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Alan P. Sloan, Vice President
General Manager, WCBS-TV

Subject: SMALL FAVORS

Spokesman: Robert O'Neil

Broadcast: April 23, 1970
11:25 PM

Here at home the Vietnam Mobilization Committee is disbanded and the demonstrators are diverted to the issue of the environment. In Southeast Asia meanwhile, the Communist forces are knocking at the gates of the capitals of Laos and Cambodia.

With President Nixon under so little political pressure at home and so much military pressure abroad, it is perhaps remarkable that he made any troop withdrawal announcement at all this week.

But he did, and at first glance the announcement seems even generous to the dovers. For the first time, the President has committed himself to withdrawals over the long term, rather than the short term. He plans, he says, to pull out 150,000 troops from Vietnam by the end of next spring. Perhaps all of us who want out of Vietnam should be thankful. But if we are, we are being thankful for small favors.

For the withdrawal projected here averages out to the same slow and cautious monthly rate that we have had

WCBS-TV Editorial—Continued

so far. It will leave at the end over 280,000 troops still in Vietnam, half of them presumably combat troops, fighting and dying.

At the same time, the President's announcement is one more step by this administration to close the accounting books on the Vietnam War to the public. For a year, under this plan, the President can claim to be conducting a withdrawal program while keeping the actual rate of withdrawal hidden from public scrutiny. The administration has already presented its budget in such a way that the costs of the Vietnam War are now hidden.

The Nixon administration thus seems to be following the Johnson administration's principle that it is more important to keep Hanoi guessing than to keep the public informed.

WCBS-TV does not subscribe to that principle. And it does not subscribe to a so-called withdrawal program that after two and a half years still leaves the country deeply and indefinitely bogged down in a meaningless war.

WCBS-TV EDITORIAL REPLY

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Alan P. Sloan, Vice President
General Manager, WCBS-TV

Subject: TROOP WITHDRAWALS 3

Spokesman: Charles Wiley

Broadcast: April 27, 1970
11:25 PM

(Last month, prior to the President's recent announcement, WCBS-TV called on President Nixon to come up with the next phase of his troop withdrawal program in Vietnam. Here with another point of view is Charles Wiley, Newsman and Executive Director of the National Committee for Responsible Patriotism.)

While calling for a more speedy withdrawal of American troops from Vietnam, WCBS-TV suggested that our government is fearful that (and I quote): "the dominoes in Southeast Asia will start to fall." The editorial ended with the advice: "never mind those dominoes."

This approach to our country's problems overseas is—I believe—wrong, shortsighted and very dangerous.

The United States has made solemn commitments concerning Southeast Asia. We must not—as a moral nation—ignore them. And if we do not honor our word because it is difficult to do so, other countries will not trust us in the future.—at a time when we may need their trust.

WCBS-TV Editorial Reply—Continued

The attitude of "Let the dominoes fall" is contributing to a steady escalation of appeasement—and isolationism. Some—including at least one Senator—who once called only for the surrender of South Vietnam to the Communists, are now willing to turn over all Indo-China to the Hanoi regime. They once excused their appeasement by claiming that the Communist terror war in South Vietnam was a "domestic affair"—Vietnamese fighting Vietnamese. But now they admit—and tolerate—North Vietnam's open invasion of Laos and Cambodia—even as the dominoes begin to topple.

And many would give the Soviet Union a free hand in the Middle East.

Apparently the lessons of history have been lost. Some seem to have forgotten that power vacuums are filled by agressors—and appeasement leads to bigger wars.

Thirty years ago, those who had watched the dominoes fall in Europe were forced to watch the Nazis level their cities, rape their wives and drag their children into concentration camps.

And eventually the dominoes tumbled across the world and landed on Pearl Harbor, U.S.A.

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Alan P. Sloan, Vice President
General Manager, WCBS-TV

Subject: CAMBODIA

Spokesman: Robert O'Neil

Broadcast: May 1, 1970
6:55 PM

President Nixon's decision to send American forces across Cambodia's borders raises far more questions than we can cover here. Some of the most important of these questions were passed over in the President's speech last night, such as the consistency of his action with his electoral mandate from the American people, with his assurances to the Congress, with his own Guam Doctrine, and with constitutional and international law.

We will limit our comment to one question the President did raise. Does this move widen American involvement in Southeast Asia? Last night we received his assurance that it does not. It is, he says not an invasion or a long-term occupation of Cambodia territory. The operation will be over once it achieves its limited objective of destroying the headquarters and supply depots of the Vietnamese communists in border sanctuaries, installations which pose an immediate threat to the safety of American troops and the success of his troop withdrawal and Vietnamization programs in South Vietnam.

WCBS-TV Editorial—Continued

We sincerely hope that the President's prediction proves accurate.

As we see it, however, this operation is not likely to be limited, even if it is successful. For one thing, this eight-week operation is not likely to save the present government of Cambodia, although the President seems to imply that it will. The Lon Nol regime and its army are pathetically weak. They are opposed by a patient and battle-hardened force of Communist guerrillas, who are now allied with the exiled former Cambodian ruler Prince Sihanouk. And by yesterday's action the Communists have now been handed an excellent excuse for a military push against the Lon Nol regime which deposed Sihanouk. To meet this challenge will require a crash aid program, investing American arms, money and probably men.

Would the administration make such an investment? Well, President Nixon told us last night that the overthrow of the Lon Nol government would make Cambodia in his words, "a vast staging area and springboard for attacks on South Vietnam." He clearly believes then, that the question of who is in power in Phnom Penh is vital to the American position in Southeast Asia.

We fear, therefore, that by yesterday's action the United States may have been committed to more than a one-shot search-and-destroy mission. We fear it may have been committed to a new war in Cambodia.

WCBS-TV EDITORIAL

CHANNEL 2, 51 WEST 52 STREET
NEW YORK, N.Y. 10019

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Alan P. Sloan, Vice President
General Manager, WCBS-TV

Subject: CHANGE IN TONE

Spokesman: Robert O'Neil

Broadcast: May 9, 1970
6:55 PM

In recent days the conduct of the administration has changed in tone, if not in substance.

True, it has not really explained adequately why American troops are tearing up the Cambodian jungle. Nor has it dispelled the nation's grief over the four students killed at Kent State.

But the behaviour of President Nixon and his aides in the past days may at least have contributed to an improvement in the emotional climate.

At his news conference last night, for instance, the President, while he may have said little to justify his Cambodia decision, at least showed himself to be poised, articulate and in command of his polices. His performance tended to disprove speculation that he was becoming isolated in the White House and feeling the strain of his job. Similarly, he has managed to change the image of himself as cut off from the dissenters in the Nation. Whereas last November we had the picture of a president

WCBS-TV Editorial—Continued

who turns on a televised football game to drown out the noise of demonstrators, today we had the picture of a President who stopped in the stillness of dawn at the Lincoln Memorial to talk earnestly with dissenters about the war.

And the rest of the administration seemed today to have taken its cue from President Nixon. There were Attorney General Mitchell and H.E.W. Secretary Finch, patiently discussing administration policies with groups of critical students.

Whether any of this will help persuade the hundred thousand demonstrators who came to Washington to stick to peaceful protest in the future remains to be seen. But it seems to us that the administration on its side has helped considerably to restore at least the semblance of a dialogue.

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Alan P. Sloan, Vice President
General Manager, WCBS-TV

Subject: TOLERANCE AND DISSENT

Spokesman: Peter Kohler

Broadcast: May 14, 1970
6:55 PM

President Nixon's decision to send American troops into Cambodia, and the manner in which he made and explained that decision have widened the terrible divisions in our society. And as the gulf between those who support and those who oppose the Vietnam war grows greater, arrogant self-righteousness and intolerance grow greater, too.

And it is the growing intolerance and self righteousness of some of the most vocal opponents and supporters of the war that most disturbs us at this point. For as a people, we have best succeeded in solving our gravest problems through public debate, through elections, through the kind of reasonableness that respects opposing points of view. And it is this reasonableness that is so lacking lately in the words of some political leaders—men on both sides of the war issue—and in the actions of some war protesters and in the actions of some counter demonstrators like the roaming bands of construction workers in New York City.

WCBS-TV Editorial—Continued

There is a danger in all this overindulgence in self-righteousness. There is a danger in the arrogant pose by many war supporters that they, and only they, are true red-blooded patriotic Americans. There is the same danger among some war protesters who believe that they and only they are morally right and that anyone else who disagrees is a war criminal. And that danger is that if this trend of intolerance continues, if this division grows, our system of government may be seriously underminded; and it is our system of government that is our best hope for resolving this terrible conflict.

This is a good time for all of us to begin heeding some excellent advice from President Nixon advice which he grieviously has failed to heed at times. The advice is to lower our voices so we can listen to one another. This Nation can't shout its way out of the tragic war in Southeast Asia. We must find our way out through the political process, through our system of government, a system that succeeds through reason and reasonableness.

WCBS-TV EDITORIAL REPLY

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Alan P. Sloan, Vice President
General Manager, WCBS-TV

Subject: SMALL FAVORS 2

Spokesman: William B. Seebeck

Broadcast: May 15, 1970
11:25 PM.

(WCBS-TV criticized the President's recent troop withdrawal announcement saying the rate was too slow. Here with another point of view is William B. Seebeck, Press Secretary of the National Student Coordinating Committee for Freedom in Vietnam and Southeast Asia.)

WCBS-TV expressed unchanged dissatisfaction with President Nixon's announced withdrawal plan, cutting our forces by more than half. We can understand why. Having taken a stand by calling for immediate withdrawal in its first editorial on President Nixon's Vietnamization policy, WCBS-TV's arguments become irrelevant to those who will not accept Vietnam as America's first defeat. We believe them to be in the majority. Perhaps this is why the so called Peace Movement has once again resorted to disruption and violence.

There can be little discussion on the merits of Mr. Nixon's move into Cambodia—which we regard as a long overdue step towards peace—between those who would

WCBS-TV Editorial Reply—Continued

have us totally lose and those who would have us win, no less than peace with freedom.

Discussion must therefore again center on the more basic issue of whether we as a nation ought to win or lose in Vietnam.

After years of impardonable strategic blunders due to lack of resolve and determination the least we owe the Vietnamese and ourselves is a meaningful peace—a peace with freedom.

Such a peace is within our grasp. All we need do is convince the enemy that we are determined to settle for no less.

As we said before, Hanoi seeks to impose on us massive casualties in retreat. Military men estimate that in immediate withdrawal, we stand to lose 20 to 30% of our men.

This and ensuing consequences to our security are too high a price for appeasement of WCBS-TV. Already present withdrawal plans bring into question the safety of our men still in the field. This is no time for some in Congress to play partisan politics with abortive moves to limit the President.

All options must be left open to him lest the enemy underestimate our determination to defend our men.

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Alan P. Sloan, Vice President
General Manager, WCBS-TV

Subject: CAMBODIA 2

Spokesman: Charles Wiley

Broadcast: May 18, 1970
6:55 PM

(WCBS-TV expressed the fear that, despite President Nixon's assurances, the decision to send American troops into Cambodia may have committed the United States to a new war in that country. Here with another point of view is Charles Wiley, Newsman and Executive Director of the National Committee for Responsible Patriotism.)

The rhetoric of the criticism of American policy has become—I believe—emotional instead of reasoned. The critics—hardened in their position, self-made prisoners of their commitment—often lose sight of logic.

For example, WCBS-TV stated that American attacks on North Vietnamese troops in Cambodia have handed the Communists an "excellent excuse for a military push." This is a contradiction in terms. Obviously, we did not give them an excuse to intervene in Cambodia since they were already there.

The editorial said that the war is being widened because of our military action in Cambodia. It would be more

WCBS-TV Editorial Reply—Continued

accurate to say that a new aspect has been added. Until now, the enemy has been shooting at—and killing—Americans from a privileged sanctuary. The war has been widened only in the sense that our men are now shooting back. Under the reasoning of the critics, a crimewave is widened when police return the fire of gangsters.

WCBS-TV suggested that our action in Cambodia is contrary to international law. Does international law deny the right to defend yourself against an enemy firing from across the border? WCBS-TV has not suggested—nor should it—that the Israelis are breaking international law by attacking, in adjoining countries, the guerrilla bases that are being used to launch raids into Israel.

It was also suggested—as many opponents of the war often indignantly charged—that an "electoral mandate from the American people" has been somehow ignored because we have not abandoned South Vietnam. The facts are that in the last Presidential election the most dovish of the three major candidates—the man supported by most doves—received less than 43% of the vote. Hardly a mandate. And in the most real test of public opinion—at the polls, not in the street demonstrations—Senator Yarborough, an outspoken dove, was soundly defeated by Democrats in a major political upset.

Peace is not served by this kind of criticism. Only the enemy—the agressor who cruelly launched this war—is gaining from the type of rhetoric that bombards us on the homefront.

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Alan P. Sloan, Vice President
General Manager, WCBS-TV

Subject: COOPER-CHURCH AMENDMENT

Spokesman: Robert O'Neil

Broadcast: May 19, 1970
6:55 PM

As you know, President Nixon's decision to send U.S. troops into Cambodia has provoked a heated constitutional debate between the White House and Congress. The debate centers upon the powers to make and conduct war, powers that Congress and the President share according to the Constitution.

President Nixon defends his decision to send U.S. troops across the Cambodian border, citing his constitutional authority as Commander in Chief of the armed services. But some members of Congress challenge his action, invoking the constitutional power of Congress to declare war and to maintain the armed forces. This power, they say, was ignored by the President in his Cambodian decision.

And so to reassert the role of Congress in matters of war and peace, Senator John Sherman Cooper, Republican of Kentucky, and Senator Frank Church, Democrat of Idaho, have introduced a controversial measure. The Cooper-Church Amendment would, as of July 1, ban the

WCBS-TV Editorial—Continued

use of any appropriated funds for retaining American military forces in Cambodia or for providing Cambodians with American advisors, mercenaries or air-combat support. This, then, is an attempt to impose limits, reasonable limits, on the Cambodian adventure through Congress' power over the purse.

While we have some misgivings about this approach, we believe that it is called for in this case. For one thing, it does not conflict with Administration policy; it merely requires the President to live up to his pledge to cease our involvement in Cambodia by the end of June. But more important, the value of this amendment lies not so much in what it specifies, but in what it signifies. The Cooper-Church Amendment signifies resolve of the Senate to be a partner in decisions of war and peace. It tells the President that he erred in committing troops to a Cambodia front without consulting Congress.

We support the goals of this amendment, in both Houses of Congress. We support it not in the expectation that it will unduly restrict the President. We support it rather in the hope that it will reassert the Congress' role in questions of peace and war.

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Alan P. Sloan, Vice President
General Manager, WCBS-TV

Subject: SOUTH VIETNAM AND CAMBODIA

Spokesman: Robert O'Neil

Broadcast: May 29, 1970
11:25 PM

The agreement reached this week by the foreign ministers of Cambodia and South Vietnam should concern every American. For that agreement does not involve South Vietnam and Cambodia alone. American interests are involved, deeply involved.

This open-ended agreement gives South Vietnam what appears to be an unlimited fighting role in Cambodia. And South Vietnamese President Thieu has reportedly said that American logistical and combat support would be needed to sustain those operations. As you know, President Nixon has pledged to withdraw U.S. forces from Cambodia by the end of next month, and the Senate is debating a measure that would require the President to cease U.S. military operations in Cambodia by July first.

In our view, this latest move by Cambodia and South Vietnam makes it even more urgent that Washington cease American military operations in Cambodia.

WCBS-TV Editorial—Continued

Otherwise, we fear that U.S. involvement in this spreading conflict will grow, instead of diminish. The agreement between Cambodia and South Vietnam is full of dangers. It will spread thin the South Vietnamese forces already over-extended in Cambodia. It is likely to slow American withdrawal from South Vietnam, because Saigon's forces will be spread so thin at home. And finally, it will widen the war in Indo-China, instead of encouraging a negotiated settlement.

The agreement between Cambodia and South Vietnam is fraught with danger. It is up to President Nixon and Congress to see to it that the danger is theirs, and not ours.

—WCBS-TV—

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Alan P. Sloan, Vice President
General Manager, WCBS-TV

Subject: NIXON SPEECH

Spokesman: Peter Kohler

Broadcast: June 4, 1970
11:25 PM

As you know, President Nixon has spoken again about his decision to send American troops into Cambodia, and, again, in our view, he has oversold his decision.

Speaking before a nationwide television audience Wednesday night, Mr. Nixon characterized the Cambodian operation as, and I quote: "The most successful operation of this long and difficult war." This assessment comes after little more than a month of operations in Cambodia, and after more than five years of heavy American involvement in Vietnam. It is, we think, a premature assessment.

To be sure, the Cambodian venture has been successful statistically. And the President was quick to cite the numbers: 15,000 rifles captured; 10 million rounds of ammunition, 2,000 mortars; 11 million pounds of rice.

The fact remains, in our opinion, that all this booty from the Cambodian invasion is not enough to justify it. The success or failure of this decision must be meas-

WCBS-TV Editorial—Continued

ured in more than AK-47s. The success will be determined in whether it speeds or slows the rate of American withdrawal, not just this October, but in the time to come. The success or failure will be measured by whether the invasion widens the warfare in Indo-China, or whether it tends to slow it, to spur a negotiated settlement.

And in these important terms, we say it is much too early to proclaim this operation a success. On the contrary, in our view, the Cambodian venture is fraught with great risks. Those risks include a wider war and slower withdrawal over the long run, because Saigon's forces will be spread so thin at home. And while it is encouraging to note that the President has maintained his timetable for withdrawal to date, it should not be forgotten that more than a quarter of a million Americans will remain in Vietnam one year from now under the President's program.

In our opinion, the most successful operation of this long and difficult war will happen on the day that those men come home.

—WCBS-TV—

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20054

IN RE DEMOCRATIC NATIONAL COMMITTEE,
Washington, D. C.

Request for Declaratory Ruling Concerning
Access to Time on Broadcast Stations

To: The Commission.

REPLY OF THE DEMOCRATIC NATIONAL COMMITTEE

On May 19, 1970 the Democratic National Committee (DNC) requested that the Commission issue as expeditiously as possible a declaratory ruling that:

> Under the First Amendment to the Constitution and the Communications Act, a broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as the DNC, for the solicitation of funds and for comment on public issues. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

This proposed ruling was designed to assist the DNC to overcome artificial and arbitrary barriers erected by broadcasters to inhibit the purchase of air time for comment on controversial issues of public importance and the solicitation of funds.

The need for an expeditious ruling is even more urgent today. As a result of the diligent inquiries of the Commission, it is clear that the broadcasters' policies in this area are confused and conflicting. The inescapable con-

clusion is that the Commission should establish a national, uniform communications policy to guide the networks and thousands of affiliated and independent broadcast stations in the discharge of their public responsibilities which will enable the DNC to solicit funds and comment on public issues.

The following recent developments underscore the need for a prompt ruling by the Commission:

1. The CBS network has informed the Commission that it will continue to refuse to sell time to the DNC for the purpose of presenting a viewpoint on controversial issues of public importance, except during what it considers to be an election campaign. In a voluminous brief to the Commission, CBS does little more than elaborate on the one-sentence justification offered for this policy last March, when it was reported that its "news organization can give a fairer presentation than others." *New York Times*, March 22, 1970.*

CBS has announced, however, that it is reversing its position with respect to the purchase by political parties of spot announcements (not to exceed one minute in length) designed to solicit funds for the party. It is not

* The DNC does not believe it necessary to respond in detail to the CBS brief which, as could be anticipated, raises a parade of imagined administrative and public policy horribles and cries that the DNC proposal portends the demise of America's right to know and learn. This is, of course, the same type of argument which some broadcasters have advanced in opposition to the fairness doctrine itself, to the personal attack and political editorializing rules, to the political broadcast provisions of section 315 and to every other issue which has threatened the "right" of the broadcaster to unrestrained use for profit of the facilities which he is licensed to operate, as a fiduciary, in the public interest. *Red Lion Broadcast Co.* v. *FCC*, 395 U.S. 367, 389 (1969). The fact that ABC and NBC recognize that they can accommodate the DNC program proposal and still meet their obligations under the fairness doctrine is answer enough to CBS.

clear whether these announcements can contain expressions of viewpoints on controversial issues of public importance.

2. The ABC network, while reaffirming its general policy of refusing to "sell time for controversial issue programs or announcements" or to "permit the solicitation of funds . . . on controversial issue broadcasts," has announced that it is now prepared to accept orders for time from major political parties for such programs or announcements. ABC has initiated this policy in recognition of the "vital importance" of the "continued strength and viability of our two party system" and "of a wider base for political contributions." (See attached letter of June 10, 1970, from Everett H. Erlick to William R. Ray).* It is not clear for what length of time its new policy will remain in effect.

3. The NBC network has informed the Commission that it has no policy which prevents it from accepting an order for program time from a major political party for presenting views on controversial issues of public importance. It would also permit such a program to include a solicitation of funds. (See attached letter of June 22, 1970, from Howard Monderer to Hilburt Slosberg.) It is not clear whether NBC would permit short spot announcements, outside such a program, designed for the solicitation of funds for the party.

4. As we indicated in our initial request, (pp. 13-14), in addition to the three national commercial networks, as of April 1, 1970, there were, on the air, 509 commercial VHF television stations, 4,280 standard broadcast stations, and 2,111 commercial FM stations. Any number

* Since ABC has made it clear that it will make the desired time available to DNC, we take no position on ABC's adherence to policies which would restrict access to its facilities by others.

of these stations—some affiliated, some independent—may have a variety of policies which will prevent the DNC from gaining access to the broadcast media.

In view of the considerations detailed in our original request and the developments reported herein, we again respectfully urge the Commission to issue as promptly as possible a declaratory ruling providing that:

a. Under the First Amendment to the Constitution and the Communications Act, a broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as the DNC, for the solicitation of funds and for comment on public issues. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); or alternatively,

b. Any such "general policy" will be taken into consideration—in a manner adverse to the broadcaster—by the Commission in evaluating whether the grant of a broadcaster's renewal application accords with the public interest.

Respectfully submitted,

DEMOCRATIC NATIONAL COMMITTEE

By /s/ Joseph A. Califano, Jr.
JOSEPH A. CALIFANO, JR.
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June 29, 1970

[Certificate of Service Omitted in Printing]

F.C.C. 70-861

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

IN RE DEMOCRATIC NATIONAL COMMITTEE,
WASHINGTON, D. C.

Request for Declaratory Ruling Concerning
Access to Time on Broadcast Stations

MEMORANDUM OPINION AND ORDER

(Adopted August 5, 1970; Released August 12, 1970)

BY THE COMMISSION: COMMISSIONER COX CONCURRING AND ISSUING A STATEMENT; COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT.

BACKGROUND—REQUEST AND PLEADINGS

1. On May 19, 1970, the Democratic National Committee (DNC) filed with the Commission a request that the Commission issue a declaratory ruling that

"A broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues." [1]

2. DNC seeks a declaratory ruling on these matters because of its desire to purchase time on individual broadcast stations and networks for the purpose of pre-

[1] Comments with respect thereto were filed by the American Broadcasting Company (ABC) on June 11, 1970 and by the Columbia Broadcasting System (CBS) on June 22, 1970 and a statement by the National Broadcasting Company (NBC) was filed on June 22, 1970.

senting programs and spot announcements of varying duration, some of which would be devoted to the solicitation of funds while others may contain comment on various controversial issues of public importance. The campaign envisioned will, according to DNC, require the expenditure of "thousands of dollars" and thus it seeks assurance that it will be able "to obtain the access to the broadcast media which implementation of the plan demands." It appears that in the latter part of March, 1970, CBS rejected a request by DNC to purchase one-half hour of prime time for the presentation of an issue—oriented program which would have included an appeal for contributions to the Democratic Party. It is said that CBS' position at that time was that it would sell time for political purposes only during election campaigns. DNC also approached NBC and was told that that network would make available prime time for purchase by the Committee for a program presenting the views of the party on important public issues and including a solicitation of funds for the party. It is not clear that DNC approached the ABC network in view of the latter's alleged general policy against solicitation of funds other than for charity and with network approval. By reason of the foregoing and the alleged common policy of individual broadcast stations to decline to sell time for spot announcements or programs for the broadcast of views on controversial issues of public importance or for the solicitation of funds, DNC states that its problem—access to broadcast licensees for the presentation of its programs—can be resolved only through the issuance of the blanket declaratory ruling described in paragraph 1, *supra*.

3. We believe that the policy matters raised by DNC are, to a substantial extent, appropriate for consideration and that a full statement of our views will provide helpful general guidance for the public and Commission licensees. We, however, do not believe that all of the va-

rious matters raised by DNC are susceptible to the declaratory order sought and we cannot at this juncture rule upon every conceivable factual situation which may arise.

4. In support of its request, DNC has set forth some pertinent financial considerations of present-day political campaigning and the development of a narrow rather than a broad-based financial support of political parties.[2] DNC contends that access to mass media, particularly radio and television, is necessary to attract the attention and seek the support of potential small political contributors. It is only in this way, DNC contends, that a healthy political system can function. DNC urges that its proposed broadcast campaign should not be precluded by a variety of differing station and network policies and that the question of access to broadcast media for responsible groups should be subject to a uniform national policy. The arguments advanced by DNC are based upon constitutional, statutory and public policy grounds.

5. The constitutional argument advanced by DNC is essentially that the Supreme Court's decision in *Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, 395 U.S. 367 (1969) reaffirmed the public's First Amendment right to hear contrasting views on issues of public importance and "employed language that would extend to members of the public the right of access to broadcast facilities." DNC

[2] For example, in 1968, $90 million was expended on political use of radio and television (equaling about 1/3 of the total expenditure on political campaigning for the year). See Alexander and Myers, *A Financial Landslide for the GOP*, Fortune. March 1970, pp. 104, 189. Another indicative statistic is the fact that in 1956, only 40% of the contributions to the Democratic Party exceeded $500 whereas the figure had increased to almost 80% in 1968. According to DNC the narrowing of the political contribution base can result in a dangerous concentration of the sources of revenue in special interest groups which, in turn, threatens the entire democratic process.

argues that the network policies of ABC and CBS represent arbitrary barriers to broadcast facilities contrary to the law as expressed in *Red Lion, supra.* DNC suggests that under the *Red Lion* standard reasonable restrictions by broadcasters are permissible—e.g., limitation of use of broadcast facilities to responsible spokesmen and protection against use of facilities for libelous presentations or those in bad "taste."

6. According to petitioner, the overriding public policy consideration requiring the declaratory ruling is that the public airwaves—the most powerful communications medium in our society—which are used to solicit funds for "soaps, brassieres, deodorants and mouthwashes" should be utilized to solicit funds to enhance the exchange of ideas. DNC contends that regardless of whether the Commission issues the declaratory ruling requested, the refusal of a broadcaster to sell time to DNC should be evaluated adversely to such broadcaster at time of renewal. The reason for this, DNC urges, is the importance of the broadcast media to political expression (*Farmers Ed. and Coop Union* v. *WDAY*, 360 U.S. 525, 529-30 (1959)); the public interest consideration inherent in broadcasters making time available for political broadcasts (*Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 20 RR 1901 (1960)); the Commission's prior holding that an arbitrary limitation of coverage of an election campaign prior to the campaign was contrary to the public interest (Citing *Homer R. Rainey*, 3 RR 737 (1947); *City of Jacksonville*, 12 RR 113, 180j (1959); and *Loyola University*, 12 RR 1017, 1099 (1956)) and that the Commission's ruling in *Women's Strike for Peace* (letter of November 22, 1965) predates *Red Lion* and, to the extent it conflicts with that decision, is no longer controlling. Finally, DNC notes that it is seeking not a ruling which would require a broadcaster to accept particular programs or announce-

ments, but only that broadcasters may not establish arbitrary barriers to access by responsible groups, such as DNC, contrary to the First Amendment and *Red Lion, supra*, or that the establishment of such barriers is contrary to the public interest.

7. *Response of the Networks:* In response to the DNC request, American Broadcasting Companies, Inc. (ABC) submitted portions of its "standards and policies" (The complete version has been filed in BAL-5733, Exhibit I-B, Attachment B, Section III). ABC recites its standards relating to solicitation connected with appeals for charity (no solicitation without specific permission of ABC) and appeals related to religious broadcasts (solicitation permitted in prescribed manner not here relevant), but states that its policy is not to sell time for solicitation of funds in other situations, absent special public interest considerations. It is ABC's judgment that DNC's request is concerned with "the continued strength and viability of our two party system" and is thus a "special public interest consideration" justifying an exception to its normal policy of not selling time for solicitation purposes.

8. ABC states that with respect to controversial issues of public importance, there are "dozens" of "responsible entities" who would wish to purchase time to present their views "were we to open the door." ABC contends that it would be "reasonable to anticipate a flood of such requests." Thus, ABC states, it will adhere to its general policy against the sale of time for controversial issue programs and announcements. However, ABC under its "special public interest consideration" standard would ". . . be prepared, consistent with its other obligations, to accept such orders for time from major political parties as can be accommodated on a reasonable basis."

a. CBS' lengthy response to the DNC complaint advances three major arguments: (1) that DNC has mis-

understood CBS' policies relating to presentation of controversial issues and that CBS' policies insure full and fair presentation of such issues; (2) that a regulatory policy which imposes common carrier obligations on broadcasters would be contrary to the public interest; (3) that there is no constitutional or statutory right to compel broadcasters to carry the DNC programs; and, (4) that such obligation would be contrary to the Communications Act and Commision precedent.

9. With respect to the first major argument, CBS argues that DNC has not alleged violation of the fairness doctrine but rather seeks to take presentations of controversial issues away from the control and supervision of the licensee. CBS states that if licensees were required to permit the purchase of air time for the presentation of views on controversial public issues, the nature of broadcasting would be radically altered to the detriment of fair, objective and balanced information available to the listening public.[8] CBS has followed a policy of refusing the sale of broadcast time for presentations of controversial issues in favor of providing "significant opportunities" for such discussions without charge to proponents of various viewpoints through news and information broadcasts. To sell time for presentations on public issues, argues CBS, would result in the preemption

[8] CBS asserts that it has served the public by presenting issues and viewpoints within a balanced program schedule utilizing newsworthiness as the sole criterion. CBS emphasizes the growth of public affairs and news presentations during the 1968-69 v. 1956-57—e.g., total hours of news and public affairs broadcasting—1,354 v. 675; prime presentations—192 v. 34; regularly scheduled hard news 6:00 p.m.—11:00 p.m., 338 v. 130; and total hours of news documentaries 100 v. 37. In addition, CBS also presents a comprehensive exhibit to demonstrate the coverage given one of the major issues of the day by CBS and WCBS-TV—the Indochina War and domestic reaction to it. This Indochina exhibit includes a minute and second analysis of CBS' total coverage of this issue and runs over 100 pages.

of the limited broadcast frequencies by those with strong financial resources which would "necessarily distort the manner in which issues were presented" to the public. CBS asserts that under its present policies, it provides a "high proportion of direct presentations of views" by "the actors in the events of the day" and thus, aside from fully informing the public of differing viewpoints on controversial issues, also provides an opportunity for those holding differing viewpoints to present their own views. These direct presentations, CBS notes, are part of its overall effort to inform the public fully and fairly and are not permitted to become an instrument of "partisan advocacy." The First Amendment, CBS argues, is primarily concerned with the right of the public to be informed—as opposed to the right of the public to speak or to be heard.

10. CBS' policy against sale of time for the presentation of views on controversial issues does not apply to broadcasts on behalf of political candidates or ballot propositions. This exclusion is based upon CBS' belief that the intent of Section 315 is to facilitate the discussion of political issues by legally qualified candidates; such political broadcasts may include a direct appeal for funds so long as CBS is not involved in the collection or handling of such funds. CBS also states its intention to permit the purchase of a special category of spot announcement (up to one minute in length) for the purpose of political fund raising which need not be on behalf of political candidates or ballot propositions.

11. With respect to the common carrier argument, CBS states that such a policy would be contrary to the public interest because partisan presentations would diminish the time available for other news, sports and entertainment programs and would result in an "auction" to the highest bidder to determine what issues will be

discussed and how such discussion will be conducted. Moreover, CBS queries, would the broadcaster then be responsible for restoring the balance? How would a network choose among competing bidders if not enough time were available for all? What standard is to be used to determine "responsible entities?" CBS argues that DNC's proposal would divest the licensee of responsibility for controversial issue programming and would ultimately require the Commission to make judgments as to the specific programs which are presented or rejected.

12. The legal arguments which CBS advances—i.e., that DNC's request is without constitutional or statutory basis, that Commission compulsion to carry DNC's programs is barred by the Communications Act, and that the action which DNC requests of the Commission is contrary to the Commision's own policy and precedent—are based primarily upon the assertion that no particular person or group has the right to speak over broadcast facilities and that to assert such a right would ultimately require the Commission to assume the role of a censor or arbitor of specific programs, contrary to its long-established policy of avoiding such governmental involvement. CBS asserts that the *McIntire* case [4] stands for the proposition that "broadcasters, though licensed by the Commission and subject to its valid regulations, are not publicly owned faciliites, and there is no First Amendment right to purchase time on radio or television stations." CBS further asserts that nothing in *Red Lion* [5] indicates that *McIntire* is no longer good law or that, apart from Section 315, there is any legal obligation for broadcast licensees to sell time. Rather, CBS says, *Red Lion* merely

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[4] *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F.2d 597 (3rd Cir. 1945) *cert. den.* 327 U.S. 779 (1946).

[5] *Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, 395 U.S. 367 (1969).

sustained long-standing Commission policies which are wholly inconsistent with DNC's request.

13. To accede to DNC's request, CBS argues, would violate Sections 3(h) and 326 of the Communications Act, which taken together establish that the licensee—not the Commission—is to exercise the power of program selection. The right of *personal* reply to material previously selected for broadcast is limited to equal opportunity for political candidates, replies to personal attacks and replies to station political endorsements. CBS contends that the legislative history of the Communications Act supports its assertion that the statutory scheme envisions a system in which the broadcaster is left with the initiative of assuring that programs presented are in the public interest.

14. Finally, CBS asserts, DNC's request is "fundamentally inconsistent" with the concept of licensee responsibilities and specifically, contrary to the Commission's prior holdings that "the Commission has no power to require a broadcaster to carry or refrain from carrying any particular program, or to prescribe the content of any program presented over the air." Letter to *Women's Strike for Peace*, November 22, 1965.[6] Nothing in the *Red Lion* decision, *supra*, states CBS, indicates that the Court contemplated the abandonment of "traditional FCC fairness policies" and the adoption by the FCC of a common carrier theory as set forth in the DNC request.

15. NBC has no policy which would prevent the purchase of program time envisioned by DNC or the solicitation of funds for the party during such a program.

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[6] To support this proposition, CBS also cites *McIntire* v. *Wm. Penn Broadcasting Co., supra*; 1949 *Editorilizing Report*, 13 FCC 1246; 1960 *Report and Statement of Policy in the En Banc Programming Inquiry*, 25 Fed. Reg. 7291 (August 3, 1960); and letter to *Judy Collins*, March 24, 1970.

DNC states that it is not clear whether NBC would permit short spot announcements designed for the solicitation of funds for a party, but this simply points up the desirability of a concrete factual situation—namely, of DNC making a specific request, instead of the general, more vague approach which it has taken here.

DISCUSSION

Part I. The right of responsible entities to purchase time for comment on public issues

16. The DNC petition raises two separate questions: (i) the asserted right of political parties to purchase broadcast time to solicit funds, and (ii) the asserted right of responsible entities to purchase time for comment on public issues. In this Part I, we deal with the second question.

17. That question goes to the heart of the system of broadcasting which has developed in this country—i.e., the licensing of private entities under the public interest standard. While the issues raised by the DNC petition are fundamental, they are not open. They have long been settled adversely to the DNC position, by the statute, by the Commission, and by the Courts. We shall discuss the present system and its statutory support, the relevant precedents, and the policy considerations.

18. The system which Congress has evolved has been described in full in the landmark decisions in this field—*NBC* v. *U.S.*, 319 U.S. 190 (1943), and *Red Lion Broadcasting Co. Inc.* v. *F.C.C.*, 395 U.S. 367 (1969). We shall not repeat that discussion here. It is sufficient to note that it is based upon the unique nature of radio—that "unlike other modes of expression, radio inherently is not available to all. Because it cannot be used by all, some who wish to use it must be denied." (*NBC* v. *U.S.*, *supra*,

at 226.)[7] To resolve the chaotic situation which had resulted, Congress decreed a system of licensing private entities for short terms, upon the condition that their operations serve the public interest. It is thus incumbent upon these public trustees to fashion schedules which do meet the needs and interests of the public. To do so, the broadcaster must allocate programming among the several categories (e.g., entertainment, instruction, news, public affairs) and, within those categories, must choose among the many competing requests for air time. See *Report on Editorializing*, 13 FCC 1246, 1247-48 (1949). However, there is one special obligation which the Commission has stressed—that broadcasters must ". . . devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station" (*id.* at p. 1249). Indeed, the Commission has stressed that it has allocated so much spectrum space to broadcasting, basically because of the great contribution which broadcasting can make to an informed public opinion on the vital public issues of the day. *Ibid.*, *Storer Broadcasting Co.*, 11 FCC 2d 678. It follows that the Commission can and must require the achievement of that allocation purpose by its broadcast licensees. See Section 303(b); *Red Lion Broadcasting Co. Inc.* v. *F.C.C.*, *supra* at p. 394. In short, as stated by the Court in *Red Lion*, *supra*, at p. 394, the licensee is ". . . given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern."

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[7] The Court recently reaffirmed this vital distinction in *Red Lion* (*supra*, at 388): "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish."

19. The Commission has consistently made clear that with some exceptions not here pertinent, the licensee has discretion in discharging that obligation. Thus, in its basic *Editorializing Report*, the Commission stated:

> It should be recognized that there can be no one all-embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request . . . .

This same policy is set out in the Commission's 1964 *Fairness Primer*, 29 Fed. Reg. 10415, 10416; cf. also 1960 *Programming Statement*, 25 Fed. Reg. 7291 (1960). In line with these general precepts, we have consistently held, in case after case, that with certain exceptions not here involved, no individual has a right to express his particular views by means of a broadcast facility.[8]

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[8] *Dowie A. Crittenden*, 18 FCC 2d 499 (1969); *Mrs. Margaret Z. Scherbina*, 21 FCC 2d 141 (1969); *Democratic State Central Committee of California*, 19 FCC 2d 833 (1968); *Boalt Hall Student Association*, 20 FCC 2d 612 (1969); *Mrs. Madalyn Murray*, 40 FCC 647 (1965).

20. While the licensee thus has considerable discretion in discharging "the twofold duty" stated in *Red Lion, supra*, at 377—to devote a reasonable amount of time to public issues and to do so fairly—that discretion must be exercised consistent with the public interest standard. The most basic consideration in this respect is that the licensee cannot rule off the air coverage of important issues or views because of his private ends or beliefs. As a public trustee, he must present representative community views and voices on controversial issues which are of importance to his listeners (*Red Lion, supra*, at 389, 390, 394). This means also that some of the voices must be partisan. A licensee policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner would run counter to the "profound national commitment that debate on public issues should be uninhibited, robust, and wide-open." *New York Lines Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); see also *Red Lion Broadcasting Co. Inc.* v. *F.C.C.*, 395 U.S. 367, 392 (n. 18) (1969); *Storer Broadcasting Co.*, 11 FCC 2d 678 (1968); *Anti-Defamation League of B'nai B'rith*, 9 FCC 2d 190, 191 (1966), affirmed *Anti-Defamation League* v. *F.C.C.*, 403 F. 2d 169, 170 (1968) (C.A.D.C.), *cert. den.*, 394 U.S. 930 (1969). In sum, as stressed in the *Editorializing Report, supra*, at p. 1249:

> It is this right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

See *Red Lion Broadcasting Co. Inc.* v. *F.C.C., supra*, at p. 390:

> It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here.

21. With this as background, we turn to the DNC petition. That petition seeks to overrule the above policy and to require licensees to sell time to any responsible entity to comment on a public issue. Using the CBS response as an example, we note that it would require a holding that CBS' policy in this area is inconsistent with the public interest, because although it recognizes its obligation to devote a reasonable amount of time to controversial issues of public importance (and has submitted a showing of its increasing efforts in this respect, including during prime time hours), and to do so fairly by providing ". . . significant opportunities for such [broadcast] discussion without charge to partisans of various viewpoints in [its] news and information broadcasts" (p. 3, CBS Response), CBS will not sell time for the expression of viewpoints on public issues (with the exception of political broadcasts). It is important to bear in mind that DNC has not alleged that CBS or any other licensee has failed to discharge the above-noted obligations of the fairness doctrine. Thus, what is involved in the DNC request is a question whether there is a right of access to broadcast facilities by "responsible entities" over and beyond the fairness doctrine right of the public to be informed.

22. The DNC position—that the licensee, upon request, must sell time to any responsible entity for comment on public issues—runs counter to the statutory language and the legislative history. That history shows that Congress specifically debated and rejected the idea of the licensee being required to act as a common carrier with respect to transmission of comment on public issues. See Sen. Rep. No. 772, 69th Cong., 1st Sess., p. 4; 67 Cong. Rec. 5560-5561, 12501-12504. The Act reflects this. Section 3(h) states that a broadcaster shall not be deemed a common carrier. Section 315(a) sets out the pertinent statutory standard—that the licensee must operate in the

public interest and must afford reasonable opportunity for the discussion of conflicting viewpoints on controversial issues of public importance. This language cannot be squared with the DNC position; had Congress adopted such a position, the statutory prescription would have been entirely different (e.g., . . . "including the sale upon request of time to responsible entities for presentation of a viewpoint on controversial issues of public importance"). The legislative history makes clear that the language of Section 315(a) is a "restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934" (H. Rep. No. 1069, 86th Cong., 1st Sess., p. 5 (1958)—that is, as the legislative history shows, the principles set forth in the basic *Editorializing Report*. That this is the statutory scheme is further shown by the consideration of the second sentence of Section 315(a)—that "no obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate." The purpose of this provision is to make clear that the broadcaster is not a common carrier as to political broadcasts—that he may exercise discretion as to the time to be afforded broadcasts by candidates. See *Memorandum of F.C.C.*, Hearings before the House Subcommittee of the Interstate and Foreign Commerce Committee, 88th Cong., 1st Sess. on H. J. Res. 247, pp. 84-90 (1963) (to the effect that while the licensee has discretion, he cannot adopt a policy of not devoting a reasonable amount of time to political broadcasts). It would make no sense to hold that the licensee has discretion whether or not to sell time for the most important controversial issue programming of all—the political broadcast by the candidate (see discussion within as to the preferred position of such programming), but has no such discretion as to other controversial issue programs (e.g., by a candidate's supporters; by partisans of a particular viewpoint on some public issue).

23. The administrative and judicial precedents reflect the statutory scheme. The Commission's pronouncements are long established and consistent. See, e.g., *Report on Editorializing*, 13 F.C.C. 1246, 1249 (1949); 1960 *Programming Statement; Women's Strike for Peace*, November 22, 1965. The court cases are to the same effect. *McIntire* v. *William Penn Broadcasting Co.*, 151 F. 2d 597, 600-601 (C.A. 3), *cert. den.* 327 U.S. 779; *Massachusetts Universalist Convention* v. *Hildreth and Rogis Co.*, 183 F. 2d 497, 501 (C.A. 1). DNC argues that these cases are no longer relevant in light of the Court's decision in *Red Lion*, and that that decision establishes the correctness of its position. We do not so read *Red Lion*. The Government's brief pointed up the nature of the licensee's responsibility under the *Editorializing Report*, *supra*, at pp. 14-17, 31-32, and the Court recognized the report "as the principal summary of [the Commission's] *ratio decidendi* in cases in this area" (p. 1251). The Court at the outset noted "the twofold duty" imposed by the *Editorializing Report* and the manner in which the obligations under the general fairness request differed from those under the personal attack corollary (pp. 371-379).[9] The Court's decision is based, we believe, on this foundation. The thrust of that decision is not that the broadcast licensee is a common carrier, required to sell time to all comers on public issues, but rather that he is a public trustee—a proxy—who must present *representative* com-

[9] Thus, the Court stated: "These personal attack and political editorializing obligations differ from the general fairness requirement that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attached party's side himself or choosing a third party to represent that side. But insofar as there is an obligation of the broadcaster to see that both sides are presented, and insofar as that is an affirmative obligation, the personal attack doctrine and regulations do not differ from preceding fairness doctrine." *Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, 395 U.S. at 378.

munity views and voices on controversial issues. The Court's decision thus stresses the right of the public to be informed—not the right of the broadcaster or any individual or group to speak over broadcast facilities. The private censorship by broadcasters which the Court rules out is that which would prevent the presentation of representative community views or voices.

24. There are strong policy arguments in support of the Congressional scheme. We have noted that broadcasting is inherently not open to all (paragraph 18, *supra*). That is true equally with respect to the common carrier access approach urged by DNC. The result could well be a return to the chaotic situation of radio's early days. Since the broadcast medium is a limited one, the amount of time to be devoted to public affairs—as against the other needs and interests of listeners—is also limited. This balance between the categories could be drastically skewed by a requirement that the broadcaster must make available time slots for the discussion of a controversial issue. Further, the public's agenda for discussion of public issues would then be set substantively and increasingly by the affluent—by the person or group which ". . . has the financial resources and interest to purchase sustained access to the mass communications media . . ." (*Banzhaf* v. *F.C.C.*, 405 F. 2d 1082 (C.A.D.C. 1968), *cert. den.*, 396 U.S. 842). Since the amount of broadcast time for discussion of controversial issues is limited and since the licensee must afford reasonable opportunity for discussion of both sides, the purchase of substantial blocks of time for a campaign by, say, the oil industry to discuss the issue of the oil depletion allowance would impose the burden to present reasonably the other viewpoint, and in turn would inevitably cut down on the amount of time for discussion of other issues. But we believe that such allocations of limited time are to be made on the basis of the *public* interest—not that of any private group, how-

ever powerful or affluent. Further, the public trustee would lose control over the important aspect of the manner in which the public is to be informed. We recognize that in some instances short spot announcements may serve a useful purpose in this area (see *infra*, p. 17). But we have also pointed up the limitations as to many issues of this manner of informing the public. See e.g., Hearings before the Senate Commerce Committee, H.R. 6543 (1969), pp. 142-143; *Voters Time Rept.*, p. 15. A licensee which reasonably made the judgment that an issue was too complex to be discussed in a 30-second commercial —that "hawking" the issue like a soap did not serve the public interest—would find that judgment frustrated by the DNC policy; it would be required to sell the spots and ordered to make time available to opponents on a similar basis. See *Cullman Broadcasting Co.*, 40 FCC 516 (1963); *KING Broadcasting Co.*, 10 FCC 2d 968, 970 (1967).

25. This last point—the application of *Cullman*—merits further discussion. The *Cullman* principle was developed to deal with the situation where the broadcaster has sold time to one side to present its views, has not presented or made plans to present the contrasting viewpoints, and rejects programming which he deems suitable to present those viewpoints, unless the party offering such programming will pay for its presentation. We held that the licensee could not properly insist upon payment in such circumstances. The paramount public interest, we stressed, is the right of the public to be informed. The licensee has adjudged that an issue is of importance to its area by presenting the first viewpoint; that being so, the public's right to hear the other side cannot turn on whether the licensee received money.[10] This approach perfectly fits the public trustee concept. It does not fit a

[10] For the different application of *Cullman* to the political broadcast field, see *Letter to Nicholas Zapple*, FCC 70-598 (1970).

common carrier approach. For under the latter system, the licensee has to sell the time, no matter the amount, and then finds himself having to afford free time to the proponents of the contrasting viewpoint, again no matter what the effect on his ability to serve the public interest. Further, under a common carrier approach, each side is usually relegated to purchase, with no "*Cullman*" rights. We believe that *Cullman* is a correct and sound doctrine which ties in with the public trustee concept and best serves "the public interest in the larger and more effective use of radio" (Section 303(g)).

26. In connection with the above discussion, we should note that there is of course no Commission policy thwarting sale of time to comment on public issues. Licensees are free to do so, with the caveat that the fairness doctrine, including the *Cullman* aspect, must be observed. The critical issue is whether the licensee, to discharge either of "the twofold duties" noted at the outset—to devote a reasonable amount of time to issues of public importance and to do so fairly—must sell some time to comment on public issues. The foregoing discussion makes clear that the licensee need not do so. If, for example, CBS chooses not to sell time but rather to fulfill its obligation on a sustaining basis in the manner disclosed in paragraph 9, *supra* (e.g., to provide significant free opportunity for partisan presentations), that choice is within its discretion. What is crucial is that the licensee does meet its obligation "to operate in the public interest and afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (Section 315(a).)

27. Finally, we point out that the Commission does recognize the importance of fostering "a multitude of voices" in the discussion of public issues. Thus, it sought to promote the growth of FM radio, UHF television, and noncommercial educational broadcasting, and is seeking

to promote a new technology which can make a most significant contribution in this respect—cable television. Because of the potentially great number of channels, cable opens up the possibility of common carrier channels, public access channels, etc. See Notices of Proposed Rule Making In Dockets Nos. 18397A and 18874, 23 F.C.C. 2d ——, released July 1, 1970. But the policy in the broadcast field is shaped by the inherent characteristics of that field. As we have shown, that policy is based on the right of the electorate to be informed, and is an issue-oriented "right of access," not the right of any individual to access.

28. At the risk of some repetition (see particularly pars. 24, 25), we believe it appropriate to take up the position set forth in the dissent of Commissioner Johnson.[11] We cannot accept the position of the dissent that the course we are taking conflicts with the First Amendment. As we understand it, the dissenting opinion of Commissioner Johnson urges that the operation of a broadcast station is analogous to the administration of a public facility, such as a park or a municipal bus (whether publicly or privately owned), and that once the facility is appropriately opened for the expression of views on public issues or commercial advertisements, it is a denial of First Amendment rights to reject or censor a proffered announcement constituting constitutionally protected speech by one willing to pay the customary rate, if there is ordinarily a charge. While we need not disagree with the premise that the Commission's regulation of broadcast stations under the Communications Act must meet First Amendment standards, we think that the dissent—because it ignores established First Amendment policy in

[11] That dissent is addressed also to the Commission's decision in the *BEM* case, F.C.C. 70 ——, issued this day. Our discussion here is of course equally applicable to the *BEM* case, and we so stated in that opinion.

this area—posits a non-existent individual right of access to broadcast facilities.

29. First of all, to the extent that the dissenting opinion urges a near-absolute right of any person who has the money to buy time, it would create a common carrier situation which Congress after due deliberation specifically rejected in Section 3(h) of the Communications Act, 47 U.S.C. § 153(h). Apparently recognizing this collision with the statute, the dissent states (page 25) that Congress and the Commission have permitted a form of private censorship which is inconsistent with the First Amendment. We must note in this connection that it is beyond the power of an administrative agency to declare its governing statute to be unconstitutional. *Central Nebraska Pub. P. & I. Dist.* v. *Federal Power Commission*, 160 F. 2d 782, 783 (C.A. 8, 1947). However, if that infirmity did not exist, we would have no constitutional qualms about our present decision.

30. In its assertion of the unconditional (except for suggested reasonable limitations on time, place, and manner)[12] right to buy time, the dissenting opinion takes no account of the basic, constitutionally valid policy of the Communications Act that because radio is "inherently not available to all," *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226, there is a public duty adhering to the acceptance of a license to give adequate coverage to public issues which reflects opposing viewpoints, if necessary at the broadcaster's own expense. *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367. See also 47 U.S.C. § 315(a). As *Red Lion* makes clear, the licensee is a fiduciary with obligations to present views and voices which are representative of his community. It is through this basic ap-

[12] The dissent also mentions quality standards, an exception which is hardly consistent with its argument.

proach that the paramount right and interest of the public to be fully informed is protected. The operator of a public park or transit system has no such obligation; if the analogy offered by the dissent were valid, a broadcaster would be free to present only one side of every public issue so long as he did not reject any one who chose to speak. There would be no obligation to present the other side, let alone the obligation imposed by *Cullman Broadcasting Co.*, 25 R.R. 895 (1963) to put on an opposing view without charge. It is clear, therefore, that the analogy to other types of facilities that carry speech to the public, or furnish a place for speech, is fatally faulty.

31. Furthermore, the dissent fails to be adequately specific in detailing the types of limitation which it would permit as inroads to the general principle of an absolute right of access. Presumably, the licensee would not have to turn over all of its time on a first come, first served basis, for this would mean that the issues discussed and the persons speaking would be governed entirely by money. But even if the dissent would permit the licensee to specify amounts of time and issues, the suggested system would appear to be unsound. First of all, the individual right upon which the whole dissent is premised would largely disappear. No person would have the right to discuss an issue of his choosing, at the time of his choosing, and for a duration of his choosing. How could the licensee validly determine that a particular speaker could effectively make his argument in 10 minutes, 5 minutes or a 30-second spot? Yet such determinations would be required. We have said that a licensee may reasonably determine that a position on a complex issue should not be peddled like soap in a few seconds. The dissent would presumably upset that ruling—to what purpose? Beyond these questions is the more important difficulty that depriving the licensee of the discretion to

choose representative spokesmen on controversial public issues [13] would lead us to a first come, first served platform dominated by financial considerations—the very result the dissent seeks to avoid and something the Supreme Court has already stated to be undesirable in *Red Lion.*

32. In short, we think the present system of regarding licensees as trustees, *McIntire* v. *William Penn Broadcasting Co.*, 151 F. 2d 597 (C.A. 3, 1945), *cert. den.* 327 U.S. 779, with a duty to present contrasting viewpoints through representative spokesmen, is constitutionally sound and of greater public benefit than the concept of an individual right of access, which as we have shown has great drawbacks in the broadcast field.

Part II. The right of political parties to purchase broadcast time to solicit funds [14]

33. In view of the positions now taken by the three major networks (the only parties whose policies were singled out by DNC were CBS and ABC), no extended discussion is called for in this Part.

34. NBC has stated that it has no policy against the sale of time to a major national political party, to be used for the solicitation of funds for the party, including during non-campaign periods. CBS initially rejected the DNC request since it occurred outside an election cam-

[13] There could be a case where the licensee's policy in this area would be arbitrary (e.g., where he covers the issue, and in announcements of a few seconds duration, and then refuses to let others discuss the issue on this basis). No such case is or has been before us. We have ruled on the assertions of DNC and BEM of general entitlement to time to discuss public issues. Our holding is in that context.

[14] While the DNC petition is couched in terms of selling time to "responsible entities" to solicit funds, the petition before us is that of a political party and our discussion here is confined to purchase of time by such parties for solicitation of funds.

paign, but has now revised its policy to permit the purchase during any period by a political party of spot announcements (not to exceed one minute in length) designed to solicit funds for the party. ABC set forth its policy that "absent special public interest considerations, ABC will not sell time for comment on controversial issues or for solicitation of funds" (p. 3, ABC of June 10, 1970, to William B. Ray), but then stated:

> The continued strength and viability of our two party system are of vital importance. ABC has emphasized in recent Congressional hearings the importance of a wider base for political contributions—small sums from millions of Americans rather than large contributions from a few.
>
> * * * *
>
> Because the strength and viability of the major political parties are vitally important, ABC would be prepared, consistent with its other obligations, to accept such orders for time from major political parties as can be accommodated on a reasonable basis. At the same time, we proposed to continue our general policy against the sale of time for controversial issue programs and announcements and solicitations for funds, absent special public interest considerations.

ABC then invited the Commission to address itself to its proposed treatment of the case.

35. We concur in that treatment. We note that Congress has singled out the presentation of the political broadcast as a particularly important aspect of the licensee's public interest obligation. See Section 315(a), *Farmer's Union* v. *WDAY*, 360 U.S. 525 (1958) (citing F.C.C. cases); F.C.C. Memorandum on Second Sentence of Section 315(a), Hearing before Subcommittee of Interstate and Foreign Commerce Committee, 88th Cong., 1st Sess., on H.J. Res. 247, pp. 84-90. It also requires

no discussion to establish that political parties are an integral part of our democratic process and that it serves the public interest to promote the widest possible support by citizens of the party of their choice. See *Voters Time Rept.*, The Twentieth Century Fund (1969), pp. 45-57.

36. In a 1963 ruling, *Letter to Lawrence M. C. Smith*, 40 F.C.C. 549, we sought to encourage the presentation of free broadcast time for this purpose stating:

> First, we recognize that the announcements described by you constitute an effort to achieve the worthwhile and commendable goal of broadening the base of political contributions. The importance of this effort was recently emphasized when, on May 29, 1962, President Kennedy transmitted to the President of the Senate and the Speaker of the House of Representatives legislation designed to carry out five of the important recommendations contained in the "Report on the President's Commission on Campaign Costs." In his letter of transmittal, the President stated, among other things:
>
> "In these days when the public interest demands basic decision so essential to our security and survival, public policy should enable presidential candidates to free themselves of dependence on large contributions of those with special interest. Accordingly, it is essential to broaden the base of financial support for candidates and parties. To accomplish this, improvement of public understanding of campaign finance, coupled with a system of incentives for solicitation and giving, is necessary."
>
> Furthermore, your proposal has an objective, in common with the broad policy underlying the "fairness doctrine"—the right of the public in a free society to be fully informed as to controversial issues of public importance, including those involving political parties and candidates. See paragraph 6 of enclosed *Editorializing Report.*

> Second, the question whether to present such announcements is one for the licensee, who is faced with many competing requests to allocate time for public service announcements. The Commission of course expresses no opinion as to how that time should be allocated. But the announcements in question should not be rejected upon the sole ground that the licensee would have to be fair in their presentation. *Lawrence M. C. Smith*, 25 Pike and Fischer Radio Reg. 291, at 293 (1963).

37. Whether such time is afforded on a free basis is a matter for the judgment of the licensee. The issue here is whether the licensee may adopt or follow arbitrary policies with respect to the sale of broadcast time to significant political parties for the solicitation of funds. Thus, the prior CBS policy of confining such sales of time to election periods would appear arbitrary, since the need for the widest possible financial support for political parties is not confined to such periods; and indeed we note that CBS offered no reason for such a distinction.

38. In this connection, we note that affording time for such solicitation does not raise any offsetting considerations, because of the combined force of a number of factors:

(i) This area can be appropriately singled out, since Congress has singled it out for special attention by broadcast licensees;

(ii) This would appear particularly to be an area where the relatively short announcement, limited very largely to fund solicitations, is both effective and appropriate.[15]

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[15] Of course, the licensee may exercise judgment as to how to present these solicitations for funds, and can afford more extensive programming time, if he so chooses. Indeed, we stress again the considerable discretion of the licensee, consistent with the obligation of the fairness doctrine, as to the various facets such as number, placement, length, etc. *Cf. Lawrence M. C. Smith*, 40 FCC 549.

(iii) There is no problem under *Cullman.* For, in this regard the principles set forth in *Letter to Nicholas Zapple,* FCC 70-598 (1970), would govern.

CONCLUSION

39. In view of the foregoing, the request of the DNC and ABC for a declaratory ruling IS GRANTED to the extent reflected in Part II and in all other respects, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER KENNETH A. COX

I concur. The essence of the holding as to sale of time for the discussion of controversial issues—as of the *Red Lion* and *Cullman* cases—is that a broadcaster *must* devote substantial time to the presentation of news and public affairs programming dealing with the principal issues of this area. He can sell time for this purpose—subject to *Cullman*—but we will not require him to do so against his wishes. Or he can—and this is generally to be preferred—give time for both sides. I *assume* here that the networks have given, or will give, adequate time for discussion of the key partisan political issues of our time. If not, then we must hold them to that obligation.

I therefore concur generally in this action, except for the matter contained in Paragraph 27.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

[AN OPENING PARABLE]

[Once upon a time there was a nation as great in ideals as industrialization. It had business everywhere—and unsurpassed military might to protect it. And yet its greatest strength was its foundation. For this nation professed to be governed by the consent of its citizens. To insure the successful functioning of its unusual government, free education, libraries, and full information were provided in order that its 200 million governors, through wide-open debate, might govern wisely. As the years slipped by the people spent more and more time in their air conditioned homes watching television, and less and less time listening to speakers in the public parks and reading handbills on the streets. And yet the great issues, and the need for informed governors, continued. And thus it was that the great debate about the great debate began.

[Everyone had his own theory how to get the democratic dialogue back to the people (who were all home watching their television sets). Some advocated letters, petitions, press conferences, and picketing, but they didn't seem to be successful. Attention shifted to those who advocated bombing, burning, shooting and looting, because before and after the showing of such activities it was usually possible to present a short message on television (however distorted) about the merits of the issue at hand. Then a third group came along. It said, "Let us simply go to the broadcasters peacefully, and ask them for the time to present our concerns—and even pay them." They were jeered by the crowd, but not deterred. The broadcasters politely explained that there was no longer any room at their inn for the discussion of public issues—like

war, and life, and politics—because the time all had to be used for programs and announcements necessary to the very difficult but essential task of manipulating consumers to buy useless and harmful products. And yet these patient and patriotic students, businessmen, and Senators still did not give up. They continued to preach the doctrine of "working within the system." "The government," they said, "will treat us fairly. There is reason and justice in our land. Surely a democratic people need not be violent to be heard." And so it was that they came to the FCC. . . .]

The Democratic National Committee (DNC) has asked the Commission for a declaratory ruling requiring broadcasters to supply two types of "access" to their radio and television facilities: first, the right to purchase, at current commercial rates, short "spot announcements" to solicit funds for political purposes; second, the right to purchase longer segments of airtime for presentation of political programming on important national issues. The majority, so far as I can determine, has equivocated on the first request, and denied the second. I dissent.

I

We should start with a few fundamentals. The great concept of our Constitution, embodied in the First Amendment, was that our democratic government would endure only so long as its citizens and their elected representatives had the leisure to think, the right to speak, and the freedom to criticize their government. As Supreme Court Justices Holmes and Brandeis understood, "the best test of truth is the power of the thought to get itself accepted in the competition of the market," and that in a government of free men, "the deliberative forces should prevail over the arbitrary." See *Abrams* v. *United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting); *Whitney*

v. *California*, 274 U.S. 357 (1927) (Brandeis, J., concurring).

The issues we grapple with today, therefore, pose a crucial question. How can we create a free and open "marketplace of ideas" over the radio and television medium in which citizens, and their elected representatives, can discuss the great issues that weigh upon our nation?

The second fundamental is equally important. For speech to be free, there must be both a *forum* for communication—whether it be a public park, school, town hall meeting, soap box, leaflet, newspaper, magazine, or radio or television frequency—as well as *procedural rules* to keep order, to make it possible for all (or most) to speak in turn, and be heard, in that forum. Perhaps the greatest legal distinction to be drawn in political and free speech theory is that between restrictions on the *content* of speech (which the First Amendment flatly prohibits), and regulations for the manner of speech (which the First Amendment not only permits but requires). As this nation's concept of speech derives principally from the model of the town meeting, I quote Professor Alexander Meiklejohn, one of the greatest champions of First Amendment freedoms, as he describes the town meeting:

> In the town meeting the people of a community assembled to discuss and to act upon matters of public interest—roads, schools, poor houses, health, external defense, and the like . . . . The basic principle is that the freedom of speech shall be unabridged. And yet the meeting cannot even be opened unless, by common consent, speech is abridged. A chairman or moderator is, or has been, chosen. He "calls the meeting to order." And the hush which follows that call is a clear indication that restrictions upon speech have been set up. . . . [N]o one shall speak unless "recognized by the chair." Also, debators must confine their remarks to "the question before the house."

> . . . The town meeting, as it seeks for freedom of public discussion, would be wholly ineffectual unless speech were thus abridged. . . .

Meiklejohn, *The First Amendment Is An Absolute*, 1961 Supreme Court Review 245.

Although the First Amendment would clearly ban governmental censorship of speech content, government must be concerned about the procedural rules that control the public forums for discussion. If someone—a moderator, or radio-television licensee—applies rules that give one speaker, or viewpoint, less time (or none at all) to present a position, then a censorship exists as invidious as outright thought control. There is little doubt in my mind that for any given forum of speech the First Amendment *demands* rules permitting as many to speak and be heard as possible. And if this Commission does not enact them, then the courts must require them.

The analogy to broadcasting should be clear. Yet, we have permitted a system of broadcasting to develop in this country in which private licensees serve, not only as "moderators" for the electronic forums of communication, but as all the "speakers" as well. As the majority states, our limited frequencies require someone to serve as "public trustees." No one would deny this need for a "trustee" system. But that is not the issue. The issue is whether that "trustee" must control *all* the available time, or whether policy and the First Amendment require him, in a manner consistent with his other duties, to turn over reasonable portions of that time directly to the people.

In many ways, broadcasters have resolved this issue themselves. For *they* have created a system in which immediate access is granted to one, privileged class of applicants: the commercial peddler of goods and services. As the system now operates, any person wishing to sell

products—toothpaste or "feminine deodorant spray," for example—has direct, personal and instant access to television. He can present his message, in the form he wishes —not in terms of "issues" (the general benefits of toothpaste or deodorant), but in terms of individual products. He is not forced to rely upon a "trustee" to argue the cause of his product for him under some principle of the fairness doctrine—an occasional mention on the evening news, or a Sunday afternoon talk show. He does it personally and directly.

No, our Rules of Order for radio and television are fantastically skewed. We have an individual right of access, all right, but only for hucksters of industrial garbage. Anyone wishing to discuss war, peace, mental health, or the suffering of the poor, must seek out a corporate "trustee," appointed by the government, to speak for him. But the corporations that have largely contributed to these social ills can defend their wares directly. With the help of Congress and the FCC, the broadcasting industry in this country has built perhaps the most beautiful, efficient, and effective "marketplace of ideas" ever conceived and executed. The industry finds it most profitable, however, to use that marketplace only for the sale of products—not the robust, wide open debate of a free society. And the FCC finds this in "the public interest"!

II

The majority has addressed the first issue—the right to solicit funds via short announcements—in ambiguous fashion. Stating that the three networks have grudgingly announced their willingness to accept such announcements, the majority responds: "We concur in that treatment." (Par. 30.) But how does this "concurrence" rule on the request before us—namely, that broadcasters be *required* to adopt such policies? The majority hints that

a denial of such time to political parties outside normal election periods would appear "arbitrary," but does not explain why, nor detail the consequences of such arbitrariness. Because, however, the majority states that solicitation announcements are "appropriate" in this area, I conclude that they make the networks' recently adopted policies binding on them.

In a companion case to this decision, *Business Executives Move for Vietnam Peace (BEM)*, FCC 70-860, Aug. 6, 1970, I have stated in detail my position that a broadcaster cannot accept commercial advertisements, yet reject advertisements which are political in nature. I believe the principles there stated are directly applicable to advertisements soliciting funds for political parties. I will not repeat them here, but merely incorporate them by reference. For reasons detailed in that opinion, I concur in the majority's decision to require licensees to accept advertisements by political parties soliciting funds.

I dissent, however, to the majority's position that broadcasters should not be required to offer time for short announcements to *all* persons for *any* purpose. As I have argued in my *Business Executives* opinion, once a licensee opens his forum to the presentation of commercial views, he cannot then close it in a discriminatory fashion—accepting some commercial views and political solicitations, but rejecting all others. I point out only that the Commission's partial waiver for the DNC to permit it to purchase fund-raising spot announcements only increases the arbitrariness and discrimination involved in denials of access to political parties for short announcements on current issues, or announcements by groups or individuals either soliciting funds or stating positions on national problems.

In *Wirta* v. *Alameda-Contra Costa Transit District*, 434 P. 2d 982 (Cal. 1967), for example, a public transit

company sold advertising space in its buses for commercial products, but refused to accept an advertisement by Women for Peace, which simply stated:

> "Mankind must put an end to war, or War will put an end to mankind."—President John F. Kennedy . . .

Stating that the political "advertisement" was clearly protected by the First Amendment, the court flatly ordered the company to accept the advertisements for display.

> [A]dvertising is an acceptable and effective means of communication. A regulation which permits those who offer goods and services for sale . . . access to such forum, while denying it to those who desire to express other ideas and beliefs, protected by the First Amendment, cannot be upheld.

Wirta, supra, at 990. The "vice" of censorship lay in "choosing between classes of ideas," accepting commercial ones and banning all others. Every other court faced with the same issue has followed this position. See, *e.g.*, *Hillside Community Church, Inc.* v. *City of Tacoma*, 455 P. 2d 350 (Wash. 1969); *Zucker* v. *Panitz*, 299 F. Supp., 102 (S.D.N.Y. 1969); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 328 (S.D.N.Y. 1967). The application of this arm of the law to broadcasting is relatively new and as yet undeveloped and unapplied. But see *United Broadcasting Co.* (WHKC), 10 F.C.C. 515 (1945). I have attempted to show that these cases clearly apply to broadcasting in my *Business Executives* opinion.

The lesson of these cases is clear. The Government could not, for example, allow persons selling products to speak freely in public parks, but bar those opposing the war or require them to "speak" through an interpreter

or "trustee" appointed by the Government. No court in the land would tolerate such blatant discrimination. Yet the majority permits this sort of discrimination to occur every day in our nation's electronic "public parks." Although we do not have the question before us, a broadcaster might not have to open his forum to advertising at all. But once he does, he must open it in an even-handed manner—absent some compelling showing of detriment or disruption to his normal programming services. No such evidence on this issue has been supplied to us.

I believe this Commission (perhaps for a two-year trial period) should require broadcasters to accept, up to recognized limits on numbers of commercials, *all* advertisements, whether commercial or political, from *any* person, for broadcast at rates determined by the licensee, on a first-come, first-served basis. If ghetto residents of our major cities wish to purchase announcements decrying the rat-infested, disease-ridden slums in which they are forced to live, they must be given their say. If the Daughters of the American Revolution wish to announce their support for the Vietnam War, they must be given their say. In short, I would open the broadcast spectrum to short announcements from all comers on a first-come, first-served basis. There will be time later to assess and evaluate—to consider, for example, whether the views of the rich predominate—at least, to a greater extent than they now predominate in mass media advertising. I would not expect any fairness doctrine problems. Few licensees would argue that they were unwilling to accept an advertisement because it might force them to present all views on an issue of controversy and public importance. This obligation is already incumbent upon them. And should the fairness doctrine prove unworkable in this field, it could be suspended for this type of programming.

III

The Commission also denies the DNC the right to purchase, at the going rates, half-hour or full-hour programming to discuss issues of national concern. I disagree. If broadcasters are to permit a General Motors or a Ford Motor Company, in effect, to purchase a full hour of "I Love Lucy" as a vehicle upon which to display their commercials, then I do not see how, consistent with the principles enunciated in *Wirta* and other cases, the broadcasters can refuse to permit the leading representatives of our legislative branch of government to purchase the equivalent hour to display their ideologies and concerns. I would require licensees to accept programming of a political nature, if offered, in an amount up to 5% of their prime time evening schedule on a first-come, first-served basis. Assuming four hours of prime time every evening (from 7:00 p.m. to 11:00 p.m.), and calculating 30 days per month, that would release six hours per month to "pure access" by politicians and citizens groups alike. The individual licensee would, of course, still retain the right to reject programming for inadequate technical and production quality, or violation of federal law (lotteries, obscenity, etc.). But I would assume that programming purchased by the national political parties would, almost per se, meet any pre-established quality standards. Licensee profits would remain at their present high level. And there will be time later to assess this scheme and determine the extent to which fairness doctrine obligations apply. The fairness doctrine could be suspended in this limited area, on the assumption that persons wishing to respond could purchase the necessary reply time. Obviously this 5% figure is only an initial, approximate determination, and obviously any other reasonable percentage determined by the licensee would also be approximate. But the point is that licensees could not reject *all* programming.

The majority essentially raises several objections to such a procedure. First, they argue that this would permit those with "strong financial resources" to pre-empt time and distort the presentation of issues. And they maintain that the views of the wealthy would dictate the agenda of national debate. I disagree. The short answer is that the wealthy already set the agenda for national debate, and a partial "access-for-purchase" procedure would only open a closed system to partial dissent. A longer answer, however, is simply that I have more faith in the theoretical "marketplace of ideas" than does the majority. I am not aware that opening the pages of newspapers or magazines, or the wall space of buses, train stations or subway platforms, have resulted in a preponderance of "wealthy" views. And I do know that the "political advertising" that appears in daily newspapers—urging, for example, citizens to write the President in support or opposition of the Vietnam war—is more stimulating and thought-provoking than those of department stores and food chains. All in all, I do not see any imbalance in that system of "print" access. Why should we expect it in radio and television?

But more importantly the dissemination even of "false" or one-sided political ideas often serves a socially useful purpose. False commercial ideas (such as the notion that modern cars are "safe," or do not pollute the air) are unlikely to generate opposing claims; at best, they merely goad competing manufacturers into more and more extravagant claims. On the other hand, expressions of political opinion in this country usually lead to argument and debate, not silent acquiescence; to vigorous opposition, not passive acceptance. And debate and dissent is always healthy. John Stuart Mill saw this over 100 years ago, and I do not believe the passing century has proven him wrong:

> The peculiar evil of silencing the expression of opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

J. S. Mill, *On Liberty*, quoted in *Buckley* v. *Meng*, 230 N.Y.S. 2d 924, 932 (Sup. Ct. 1962). Given a system in which the small citizen and the man of moderate means are totally cut out from a system of communication, therefore, I believe a partial access system might move a small way toward righting the present imbalance.

The majority's second justification for its position is that we have a limited number of frequencies, and that some "trustee" must necessarily exercise control over broadcasting time. Any other system would result in chaos. Again, this begs the question. Merely because a "trustee" or "gatekeeper" must control some of the time, I see no compelling reason why he must control *all* of it. Broadcasters have essentially abdicated this "trustee" authority to commercial advertisers, gobbling up sponsors as rapidly as they approach, and limiting themselves only by the commercial maximums suggested for radio and television. They have also, on occasion, sold entire hours to sponsors such as Xerox or National Geographic to present their own programming. The question before us, therefore, is whether the present system of broadcasting could function with a *partial* system of access, leaving the vast bulk of programming still under the control of the networks and individual licensees. Nothing the majority has said convinces me that this is impossible.

The third reason given by the majority is that Section 3(h) of the 1934 Communications Act prevents licensees from being treated as a "common carrier." There are many defects in this position, some of which I have dealt with in my dissenting opinion in *Business Executives*, FCC 70-860, Aug. 6, 1970. Some are as follows.

First, the legislative history of this provision suggests that the drafters of the 1934 Act were concerned only that Title II of the Act, "Common Carriers," and its rather complicated system of regulation, not be imposed on radio. No one would argue that a partial access system would have this result.

Second, Congress wrote into the 1934 Act the concept that broadcast licensees must serve the "public interest, convenience, and necessity." And it goes without saying that the basic principles of the First Amendment are also incorporated implicitly into the Act. We do not have to declare unconstitutional Section 3(h) of the Act to say that broadcasters must treat persons wishing to do business with it equally. We have ruled in our *Letter to Nicholas Zapple*, FCC 70-598 (1970), for example, that even apart from Section 315(a) considerations, there may be only one appropriate person or spokesman that can satisfy the fairness doctrine obligation imposed upon broadcasters in certain situations. Does this violate Section 3(h) of the Act, by taking from the licensee choice over the person that uses his facilities? Of course not. A limited system of access for purchase is perfectly consistent with Section 3(h) of the Act, the "public interest," and the First Amendment. Indeed, the First Amendment may require such a system or some reasonable facsimile.

Third, a reasonable system of access does not make broadcasters into common carriers. A doctrine prevent-

ing broadcasters from rejecting all persons wishing to submit political advertising or other programming does not force licensees to accept everyone. Obviously broadcasters can establish reasonable limitations on the amount of time he will offer other persons. See *United Broadcasting Co.* (WHKC), 10 F.C.C. 515 (1945). The First Amendment does not establish any particular proportion on percentage figure; it does require, however, that broadcasters devote *some* "reasonable" portion of their time to "access" programming.

IV

The matters before us go far beyond freedom of speech. For in the last analysis, we are confronted with one of the most serious challenges to the system of "checks and balances," the separation of the legislative and executive powers of government, that our country has ever faced. If, for example, through some bizarre turn of events the President, but not the Congress, was granted access to the computer, the telephone, the telegraph, the typewriter, the printing press, and the Xerox machine, we would also see a constitutional quandry of the proportions that face us now. The President has immediate, direct and vivid access to all the minds of the prime-time television viewers in America. Can our tri-partite scheme of government survive if the Congress receives substantially less?

Unlike the fairness doctrine, which often imposes a burden on broadcasters due to the importance of the *issue* to the public, principles of pure "access" pay their own way. The broadcasting industry is out-of-pocket nothing. The great mass of news, documentary and entertainment programming will be unaffected. And the forums of the air will be opened to the breeze of dissent, controversy, and thought.

Unlike the fairness doctrine, an "access" system is self-enforcing. No governmental agency is called upon to decide which issues are controversial and of public importance. Issues reach the public immediately, without the years of delay required to push a fairness doctrine controversy through the Commission and the courts.

And, unlike the present system, the views that reach the people will not be dominated by the consensus committees of the corporate television establishment. There are some who fear that the agenda of debate will be set by the rich. But who, after all, sets that agenda now? The great mass of television programming consists of format entertainment series, carefully designed as supportive and palatable packaging for the commercial content supplied by the merchandisers of our land. To the extent a network seeks to provide programming which is "offensive" to some corporate interest, then pressures for censorship are brought to bear—as Coca Cola is alleged to have pressured NBC over its recent documentary on migrant workers. All we can hope for is a system of access in which at least a small percentage of the time and views will originate directly from the people—of all views, persuasions, and walks of life. That even that modest participation is anathema to the broadcasters is testimony to their dangerous arrogance and unrestrained power. Accordingly, I dissent to today's Commission action.

IV

Relevant Pleadings Before and Orders of the Federal Communications Commission in *Business Executives' Move for Vietnam Peace*, F.C.C. 70-860

LAW OFFICES

ASHER & SCHNEIDERMAN

Thomas R. Asher
Michael Schneiderman

1320 Nineteenth Street, N.W.,
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(202) 223-1491

• Not Admitted in the District of Columbia

January 22, 1970

Mr. William B. Ray
Chief, Complaints and Compliance Division
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Ray:

This Letter of Complaint is filed on behalf of the Business Executives' Move for Vietnam Peace ("BEM"), an organization composed of over 2700 business executives and owners from 49 states (most BEM members are board chairmen or presidents). BEM also has military and diplomatic sponsors.

In June 1969 Robert Maslow, BEM's Executive Secretary, attempted to purchase air time from radio station WTOP,[1] Washington, D.C. for the purpose of broadcasting one-minute spot announcements. These announcements express opposition to the Vietnam War and particular views on aspects of the War and the policies of the United States with respect to the War. Each was produced for BEM and contains a personal statement by a military or business leader such as Rear Admiral Arnold E. True (ret.), Hon. Mariner Eccles, former Chairman of the Federal Reserve Board, or Brig. General William Wallace Ford (ret.). Each announcement closes

[1] This station bills itself as a "Post-Newsweek" station and shares common ownership with *The Washington Post* and *Newsweek* magazine as well as several other broadcasting stations.

with an invitation to listeners to send for a free copy of the speaker's complete statement on the Vietnam War.[2]

At that time, Mr. Robert Mitchell of WTOP's advertising department first told Mr. Maslow that WTOP would sell time to BEM. However, he called Mr. Maslow shortly thereafter and stated that his superiors had refused to approve the sale of time because the issue to which the announcements are directed was too controversial and because, if the announcements were broadcast, the Commission's Fairness Doctrine might require the station to give away time for the opposing point of view. BEM renewed its offer to purchase such air time in July 1969, and received no response from WTOP. On January 7, 1970, WTOP's continuing refusal to sell time to BEM for these announcements was confirmed by a letter to Mr. Maslow from Mr. Daniel E. Gold, Vice President for Business Affairs of Post-Newsweek Stations, the owner of WTOP.[3] This letter stated in part:

> "It is the policy of Post-Newsweek Stations radio stations not to sell spot announcement time to individuals or groups in order to set forth a point of view on any controversial issue of public importance."

This refusal by Post-Newsweek and WTOP violates its Constitutional and legal obligations as Licensee in the following ways:

I. *Fairness Doctrine*

WTOP is required by the Fairness Doctrine to provide BEM and its spokesmen with free air time, or, at least, to accept BEM's request to purchase such air time. Only by permitting BEM to air its views can WTOP

[2] Samples of BEM's announcements are attached.

[3] A copy of Mr. Gold's letter is attached.

comply with the legislative policy that it "afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U.S.C. § 315. The Vietnam War is unquestionably a controversial issue of public importance. Mr. Gold's letter concedes this fact; it is evident from the substantial amount of air time WTOP devotes to the War.

A. *WTOP's Coverage of the Vietnam War Has Not Been Balanced.* WTOP has regularly presented, through its newscasts,[4] the views of Government officials, military leaders and other supporters of the Administration's position on the Vietnam War. WTOP has not devoted, and does not now devote, a significant amount of time to presenting contrasting views on the War. There is no indication that WTOP plans to change this policy. The Fairness Doctrine requires that WTOP be required by the Commission to devote more time to airing views on the Vietnam War which contrast with the frequently broadcast viewpoints of supporters of the Administration policy. BEM's announcements responsibly state such contrasting views. Consequently, the Fairness Doctrine requires WTOP to provide BEM with free air time for presentation of them.

B. *WTOP Has Not Met its Obligation to Cover the Diversity of Contrasting Views on the Vietnam War.* WTOP has ignored the fact that views on important public issues are rarely monolithic; they usually have more than two sides. Thus, the Vietnam War has provoked a plurality of responsible views and opinions, some urging specific results for different and often conflicting reasons, and some urging very different results; one is not simply either for or against the War.

[4] Newscasts and commentaries on public events account for virtually all of WTOP's broadcasting since it is an "all news" station.

For WTOP to discharge its obligations under the Fairness Doctrine it must make a reasonable effort to air a fair sample of the contrasting views on the War. BEM, through the announcements it seeks to broadcast on WTOP, advocates views on the War which contrast with positions already presented on that station. WTOP cannot arbitrarily refuse to broadcast such views. WTOP should be required to broadcast BEM's announcements and thereby properly serve the "paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning those vital and often controversial issues which are held by the various groups which make up the community." FCC, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues* of Public Importance, 29 F.R. 10415, 10422 (1964).

II. *The Public's Right to Hear*

WTOP's refusal to give or sell air time to BEM effectively frustrates the public's right to hear the views of BEM and its spokesmen. The station thus denies "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences. . . ." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969).

The Commission has declared that a Licensee has an affirmative duty to make provision for adequate discussion of "all subjects of substantial importance to the community coming within the scope of free discussion under the First Amendment. . ." FCC Report, *Editorializing by Broadcast Licensees*, 13 FCC 1246, 1249-50 (1949). WTOP would have a duty to facilitate presentation of diverse views on the War even if it had not opened the door by extensively airing certain views on the topic.

Furthermore, WTOP cannot control access to its air time solely upon the basis of its distaste for the topics sought to be discussed. Yet, this is precisely what WTOP is doing. Its claimed policy allegedly based on the need for longer "in depth analysis" of controversial subjects of public importance is simply not WTOP's true policy. Brief spot announcements are regularly heard on WTOP on such controversial subjects of public importance as religion, the environment, the national economy, armed forces recruiting and smoking. Furthermore, WTOP presents editorials which take positions—in brief broadcasts—on many controversial issues of public importance, and invites responses by "responsible spokesmen."

Since WTOP regularly presents announcements of the type it has informed BEM it does not present as a matter of "policy", it is clear that WTOP is simply picking and choosing among topics and giving access to the air *solely* to those topics it prefers. This arbitrary restriction, based solely on the content of speech, is not permitted to a broadcast Licensee.

III. *First Amendment*

The First Amendment requires that WTOP present BEM's announcements. WTOP is licensed by the Government; it benefits from a "preferred position conferred by the Government." *Red Lion, supra*, 395 U.S. at 399. The announcements in question relate to an official Government policy. For the Licensee to refuse to carry them, and for the Government through its Federal Communications Commission to acquiesce in that decision, amounts to Government suppression of speech criticizing Government policy. "It is the purpose of the First Amendment to preserve an unhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Gov-

ernment itself or a private licensee." *Red Lion, supra*, 395 U.S. at 389.

For the reasons stated above, the Business Executives' Move for Vietnam Peace requests that the Federal Communications Commission order WTOP to broadcast, free of charge, BEM's one-minute announcements or, in the alternative, that the Commission require WTOP to sell BEM air time for the broadcasting of those announcements.

BEM further requests that processing of this Complaint be expedited to assure a prompt final decision on the issues raised. In no other way can these announcements reach the air at their most propitious time. See *Freedman* v. *Maryland*, 380 U.S. 51, 61 (1965). The Vietnam War is a current and changing issue. Each day that WTOP denies air time to BEM's announcements, BEM is denied the opportunity to broadcast its views in a timely way. Therefore, BEM respectfully requests prompt action on this Complaint.

Respectfully submitted,

/s/ Thomas R. Asher
THOMAS R. ASHER

/s/ Michael Schneiderman
MICHAEL SCHNEIDERMAN
1320 Nineteenth St., N.W.
Washington, D.C. 20036

/s/ Albert H. Kramer
ALBERT H. KRAMER
Citizens Communications Center
1816 Jefferson Place, N.W.
Washington, D.C. 20036

POST-NEWSWEEK STATIONS

Broadcast House, Washington, D.C. 20016

DANIEL E. GOLD
Vice President
Business Affairs

January 7, 1970

Mr. Robert A. Maslow
Executive Secretary
Business Executive's Move for
Vietnam Peace
201 Massachusetts Avenue, N.E.
Washington, D. C. 20002

Dear Mr. Maslow:

Per our telephone conversation of January 6th, this is to verify that it is the policy of Post-Newsweek Stations radio and television stations not to sell spot announcement time to individuals or groups in order to set forth a point of view on any controversial subject of public importance. We believe that subjects of this type require a more in depth analysis than can be provided in a 10, 20, 30, or 60 second announcement.

I appreciated the opportunity to discuss our policy on this subject with you.

Very truly yours,

/s/ Daniel E. Gold
DANIEL E. GOLD

ONE-MINUTE RADIO ANNOUNCEMENTS PRESENTED BY THE BUSINESS EXECUTIVES MOVE FOR VIETNAM PEACE

No. 1—Rear Admiral Arnold E. True, retired

ANNOUNCER: Rear Admiral Arnold E. True has an urgent message for you.

TRUE: Many people fear that if U.S. troops are withdrawn from Vietnam, there will be a resulting blood bath. The President stated that fifty thousand were killed in North Vietnam when Ho Chi Minh took over, and that three thousand more were killed by the Vietcong in Hue. He did not mention, however, that General Abrams reports that a hundred and eighty-six thousand Vietnamese have been killed by Americans this year. This policy of remaining in Vietnam indicates that we are going to prevent Vietnamese from killing Vietnamese by staying there and killing them ourselves.

ANNOUNCER: The preceding public service message was brought to you by BUSINESS EXECUTIVES MOVE FOR VIETNAM PEACE. For your free copy of Rear Admiral True's complete statement on Vietnam, write to BEM, 901 North Howard Street, Baltimore, Maryland 21201, or the station to which you are listening.

No. 2—Rear Admiral Arnold E. True, retired

ANNOUNCER: Rear Admiral Arnold E. True has an urgent message for you.

TRUE: Much is said of an honorable end to the Vietnam War. This war is morally corrupt, politically inept, and militarily stupid. Honor is involved in getting out rather than staying in. If a man falls into

a cesspool, he gets out in the most graceful and rapidest way he can. He does not stay in for honor or to save face.

ANNOUNCER: (Closing statement same as in Spot No. 1.)

No. 3—Rear Admiral Arnold E. True, retired

ANNOUNCER: Rear Admiral Arnold E. True has an urgent message for you.

TRUE: The Vietnam War is destroying the United States as well as Vietnam. The sooner it is ended, the sooner we will be able to heal the festering sores of poverty, inflation, pollution, racial tension here in our own country.

ANNOUNCER: (Closing statement same as in Spot No. 1.)

No. 4—Rear Admiral Arnold E. True, retired

ANNOUNCER: Rear Admiral Arnold E. True has an urgent message for you.

TRUE: According to the President, self-determination for the people of South Vietnam is a fundamental and non-negotiable plank in our Vietnam policy. I have talked to many non-government leaders in Saigon, and Vietnam, and they are almost unanimous in the opinion that the present Saigon government does not represent the Vietnamese people but is forced upon them by U. S. military power, and that it prevents rather than guaranteeing self-determination for the Vietnamese people.

ANNOUNCER: (Closing statement same as in Spot No. 1.)

No. 5—Rear Admiral Arnold E. True, retired

ANNOUNCER: Rear Admiral Arnold E. True has an urgent message for you.

TRUE: I believe that the Vietnamization of the Vietnam War will prolong that war as well as prolong the killing of both Americans and Vietnamese. For fifteen years we have been advising and training the Vietnamese Army and yet military experts say that nor they would probably be unable to hold their own with a 4-to-1 ratio in manpower assisted by the tremendous air power and naval power of the United States.

ANNOUNCER: (Closing statement same as in Spot No. 1.)

No. 6—Marriner S. Eccles

ANNOUNCER: The Honorable Marriner S. Eccles, former Chairman of the Federal Reserve Board, has an urgent statement for you and for President Nixon concerning the Vietnam War.

ECCLES: How can we reconcile what we are doing to South Vietnam under the guise of saving them from communism? We have killed or burned hundreds of thousands of children, countless parents, brothers, husbands and sons. No wonder the great majority of the people hate us and want us to get out of their country. We should be less interested in saving face, and more interested in saving lives.

ANNOUNCER: The preceding public service message was brought to you by BUSINESS EXECUTIVES MOVE FOR VIETNAM PEACE. For your free copy of Mr. Eccles complete statement on Vietnam, write to BEM, 901 North Howard Street, Baltimore, Maryland 21201, or the station to which you are listening.

No. 7—Marriner S. Eccles

ANNOUNCER: The Honorable Marriner S. Eccles, former Chairman of the Federal Reserve Board, has an urgent statement for you and for President Nixon concerning the Vietnam War.

ECCLES: The Vietnam War is responsible for the most serious financial problems in our country today. But the real tragedy is not financial. It is the useless suffering of millions of our people whose sons, husbands and brothers are killed and maimed for life because of our incompetent and ill-advised leadership. We should be less interested in saving face, and more interested in saving lives.

ANNOUNCER: (Closing statement same as in Spot No. 6.)

No. 8—Marriner S. Eccles

ANNOUNCER: The Honorable Marriner S. Eccles, former Chairman of the Federal Reserve Board, has an urgent statement for you and for President Nixon concerning the Vietnam War.

ECCLES: It is madness to continue our ruthless(ful) pursuit in Vietnam. To withdraw would be sanity. The consequences of withdrawal cannot possibly be as disastrous for the nation as pursuing our present course. We should be less interested in saving face, and more interested in saving lives.

ANNOUNCER: (Closing statement same as in Spot No. 6.)

No. 9—Marriner S. Eccles

ANNOUNCER: The Honorable Marriner S. Eccles, former Chairman of the Federal Reserve Board, has an urgent statement for you and for President Nixon concerning the Vietnam War.

ECCLES: What can we expect from the stricken Vietnamese nation but hatred, deep and abiding. Their husbands and sons are dead, maimed or missing, and children orphaned and grotesquely burned. No wonder the great majority of the people hate us and want us to get out of their country. We should be less interested in saving face, and more interested in saving lives.

ANNOUNCER: (Closing statement same as in Spot No. 6.)

No. 10—Dr. George Wald

ANNOUNCER: Ladies and Gentlemen: The distinguished scientist and Nobel prize winner, Dr. George Wald, has an urgent statement for you and for President Nixon about the Vietnam War.

DR. WALD: I have said at every opportunity what I think of the Vietnam war. I think it is a national disgrace. So people ask me, "Have you got a plan, do you have a program?" And so I began to say about that Vietnam War, "Yes, I have a program. I will tell you how to get out of the Vietnam War. In ships."

ANNOUNCER: The preceding public service message was brought to you by BUSINESS EXECUTIVES MOVE FOR VIETNAM PEACE, an organization of more than 2500 of the nation's outstanding

business executives. If you would like to have a complete copy of Dr. Wald's statement, write to BEM, 901 North Howard Street, Baltimore, Maryland 21201, or care of the station to which you are listening.

For free radio tapes of these spots write or call:

Robert Maslow
Business Executives Move for Vietnam Peace
201 Massachusetts Avenue, N. E.
Apartment #310
Washington, D. C. 20002
(202) 546-8552

BRIG. GEN. WILLIAM WALLACE FORD, U. S. ARMY, RETIRED

ONE-MINUTE RADIO ANNOUNCEMENTS PRESENTED BY THE BUSINESS EXECUTIVES MOVE FOR VIETNAM PEACE

No. 11—Brig. Gen. William Wallace Ford, U. S. Army, Retired

ANNOUNCER: Here's what Brigadier General William Wallace Ford, U. S. Army, Retired, has to say about the Vietnam War.

FORD: If we wish to get out of Vietnam, we should get out, and not fool around. De-escalation and Vietnamization are nothing more than devices for underwriting a continuing war. We should get out completely, in good order, on a pre-arranged schedule, and let the Vietnamese, North and South, come to terms with each other. In the end there is no other way to peace in Vietnam.

ANNOUNCER: The preceding public service message was brought to you by BUSINESS EXECUTIVES MOVE FOR VIETNAM PEACE. For your free copy of General Ford's complete statement on Vietnam, write to BEM, 901 North Howard Street, Baltimore, Maryland 21201, or the station to which you are listening.

No. 12—Brig. Gen. William Wallace Ford, U. S. Army, Retired

ANNOUNCER: Here's what Brigadier General William Wallace Ford, U. S. Army, Retired, has to say about the Vietnam War.

FORD: To say that we intend to get our "combat forces" out of Vietnam within a year or so is not really true, nor—if it were true—is it enough. Actually it is clear that we plan to leave artillery and air forces in support for as long as may be necessary. *Our neck will remain stuck out!* We are in Europe 25 years after World War II, in Korea 17 years after the end of active warfare there, and at this rate the sons of American soldiers now in Vietnam will be in Vietnam a generation hence.

ANNOUNCER: The preceding public service message was brought to you by BUSINESS EXECUTIVES MOVE FOR VIETNAM PEACE. For your free copy of General Ford's complete statement on Vietnam, write to BEM, 901 North Howard Street, Baltimore, Maryland 21201, or the station to which you are listening.

No. 13—Brig. Gen. William Wallace Ford, U. S. Army, Retired

ANNOUNCER: Here's what Brigadier General William Wallace Ford, U. S. Army, Retired, has to say about the Vietnam War.

FORD: The great American hang-up over Vietnam seems to rest upon pseudo-patriotic principles. We have never lost a war, and—right or wrong—we aren't going to lose this one. Well, there is no danger of losing it; we can't lose it, but we can't win it, either. Then we ought to *quit it.* Isn't there some theory that the American business sense knows when to turn back from a bankrupt policy?

ANNOUNCER: The preceding public service message was brought to you by BUSINESS EXECUTIVES MOVE FOR VIETNAM PEACE. For

your free copy of General Ford's complete statement on Vietnam, write to BEM, 901 North Howard Street, Baltimore, Maryland 21201, or the station to which you are listening.

No. 14—Brig. Gen. William Wallace Ford, U. S. Army, Retired

ANNOUNCER: Here's what Brigadier General William Wallace Ford, U. S. Army, Retired, has to say about the Vietnam War.

FORD: Getting out of Vietnam is only a beginning. We need to over-haul a foreign policy which has us maintaining hundreds of military installations all over the world. Vietnam has shown that we cannot be the world's policeman. In this case, we don't need all these police stations. Our bloated military budget of $75 billion ought to be cut in half, and the saving applied to urgent needs at home.

ANNOUNCER: The preceding public service message was brought to you by BUSINESS EXECUTIVES MOVE FOR VIETNAM PEACE. For your free copy of General Ford's complete statement on Vietnam, write to BEM, 901 North Howard Street, Baltimore, Maryland 21201, or the station to which you are listening.

WILLIAM WALLACE FORD

(Brigadier General, U.S. Army, Retired)

EARLY HISTORY

Born at Waverly, Virginia, October 2, 1898

Attended: Waverly High School
Virginia Polytechnic Institute
University of Virginia

MILITARY SERVICE

Enlisted in the Infantry, April 5, 1917
Served in enlisted grades through Sergeant
Appointed to United States Military Academy, June 1918
Graduated from USMA June, 1920
Commissioned in the Field Artillery and served at various stations in continental U.S. and Hawaii
Graduated from Field Artillery School and the Command and General Staff School
At outbreak of World War II was detailed to develop the training and operational techniques for a revolutionary Army concept: Organic Air Observation for Field Artillery. (This has grown into the present Army Aviation.)
Commanded the Air Training School at Fort Sill, Oklahoma, 1941-43
Commanded the 87th Division Artillery, 1944-45; combat service in Patton's Third Army: France, Luxembourg, Belgium and Germany.
Following World War II served in Continental U.S., Panama Canal Zone (3 years), France and Germany (3 years)
Retired in 1954, at the end of European Service.

MILITARY DECORATIONS

Legion of Merit (Oak Leaf Cluster)
Bronze Star Medal
Air Medal
Officer de la Legion d'Honneur (France)

POST RETIREMENT ACTIVITIES

Vice President, Aeronca Manufacturing Corp. (4 years)
Graduate study, Miami University (2 years)
University teaching (8 years), presently at U. Mass. (Mathematics)

PRINCIPAL HOBBY

Flying; has been licensed pilot 34 years; has own plane; flew the family to Yucatan, Christmas, 1967, to visit the Mayan ruins.

FAMILY

Wife —Alice Trowbridge Ford (nee Harris) of New York, graduate of Smith College

Children—3 boys, 1 girl, *all* graduates of Columbia College, where Mrs. Ford's great-great-grandfather (William Robert Harris) was an early President.

DATA ABOUT THE SPEAKERS

The Honorable MARRINER S. ECCLES, a financier and business executive with wide interest and experience in business and government. He is Chairman of the First Security Corporation of Salt Lake City, Utah and of the Utah Construction and Mining Company. He was Chairman of the Board of Governors of the Federal Reserve System from 1936 to 1948 and a member of the Commission on Money and Credit from 1958 to 1961. He is a trustee of the American Assembly of Columbia University and a member of the National Committee on United States-China Relations.

Rear Admiral ARNOLD E. TRUE, United States Navy, Retired, has served in the United States Asiatic Fleet in the Far East, commanded the USS Hammann and two Destroyers in World War II and was on the Staff of the Commander-In-Chief of the United States Atlantic Fleet between 1944 and 1946. He has received many decorations. During the Battle of Midway he sustained injuries which necessitated his retirement in 1946. Since then, he has been Professor of Meteorology at San Jose State College.

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JAN. 26, 1970

IN REPLY REFER TO:

8330-F1A
Cl-1178

Post-Newsweek Stations
Station WTOP
Broadcast House
Washington, D. C. 20016

In re: Complaint of Asher & Schneiderman
Dated January 22, 1970
Against Station WTOP

Gentlemen:

Enclosed is a copy of a complaint sent to the Commission concerning the operation of your station.

The Commission has no independent information concerning this complaint and has made no determination in the matter. In light of the fairness doctrine relating to the treatment of controversial issues of public importance, and in order to assist it in obtaining further information, the Commission requests that you submit your comments, in duplicate, on the complaint within ten days of the date of this letter, and that you furnish a copy of your response to the complainant.

If the complainant wishes to reply to your response, the reply should be submitted in duplicate within seven days of the date complainant receives your response. In order to expedite consideration of this complaint, it is suggested that you and the complainant furnish each other

with copies of all further correspondence sent to the Commission.

Sincerely yours,

WILLIAM B. RAY, Chief
Complaints and Compliance Division
for Chief, Broadcast Bureau

cc: Ernest W. Jennes, Esq.
Asher & Schneiderman
(Attorneys for Business
Executives' Move for
Vietnam Peace)

Letter of February 5, 1970

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POST-NEWSWEEK STATIONS
Broadcast House, Washington, D.C. 20016

LARRY H. ISRAEL
Chairman of the Board

February 5, 1970

Mr. William B. Ray
Complaints and Compliance Division
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: 8330-F1A
C1-1178

Dear Mr. Ray:

This letter is written in response to the complaint of the Business Executives Move for Vietnam Peace (BEM) dated January 22, 1970, regarding WTOP's refusal to sell time to BEM for spot announcements which included expressions of opposition to the Vietnam war and views regarding the war and related policies of the United States.

WTOP has long had a policy of not accepting spot announcements dealing with controversial issues, a policy which the Federal Communications Commission has found not to violate the Fairness Doctrine or otherwise be inconsistent with law on at least two occasions. *Letter to Washington Women's Strike For Peace,* November 22, 1965; *Letter to Joseph A. Beirne, President, Communications Workers of America,* March 8, 1968.

BEM's discussion of what occurred in the latter part of June, 1969, requires amplification. When Mr. Maslow called the station to inquire about the purchase of time, he was referred to Mr. Robert Mitchell, then a salesman who had been employed by WTOP for less than one month. Mitchell, unaware of the station's established policy, went

to Maslow's office where the details of a purchase of time were discussed. However, when he returned to the station with the BEM copy to prepare a contract for the announcements, WTOP's general sales manager informed him of the station's policy.

Mitchell attempted to reach Maslow that day and was unable to do so, but shortly thereafter did get in touch with him and informed him that the station could not carry the spots.

BEM states that it renewed its offer to purchase spots in July, 1969, and received no response. This may be so but Mr. Mitchell does not recall any such request and there are no station records of further contact with BEM or Maslow until sometime in January, 1970, when BEM requested an explanation in writing of the station's earlier rejection and received the letter from Mr. Daniel E. Gold which is attached to the BEM complaint.

I. *WTOP's Treatment of the Vietnam Issue.*

BEM's general allegation that the station has not provided balanced coverage of the Vietnam war and specifically that it has not afforded a fair amount of time to the opponents of the war or to views differing from the present Administration's policy on Vietnam is not only wholly unsupported by facts but is also the kind of charge which does not fulfill the requirements of specificity which the Commission has repeatedly required to establish unfairness. Moreover, the fact is that WTOP has scrupulously tried to provide balanced coverage of this important issue in its hard news coverage, in news interviews, in commentary and otherwise. WTOP's all-news and information format has enabled it to cover all major statements on this issue by President Nixon and various supporters of Administration policy and also to present views

which contrast with those of the Administration in a manner wholly consistent with the Fairness Doctrine.

A complete quantitative evaluation of the coverage of any station, let alone an all-news and information station, of as long-continuing an issue as the Vietnam war and President Nixon's policy with respect to that war would be virtually impossible as a practical matter. However, WTOP has made a spot check of materials available with respect to broadcasts during the three months April-June, 1969, covering the period before and immediately after BEM's request to purchase spot announcements. This check shows that the station's news reports included not only the views of Administration spokesmen and reports of Presidential statements and actions regarding Vietnam but also, on numerous occasions, the views of a variety of Administration critics on the subject. Furthermore, during this period the station provided a large amount of hard news coverage of events in Vietnam and relating to Vietnam which of course has enabled the public to develop its own views regarding the war. During this three month period WTOP also aired the views of four regular station commentators who reflected varying viewpoints with respect to Administration policies and actions in Vietnam—Carl Rowan, Drew Pearson, Rod MacLeish, and James J. Kilpatrick.

WTOP's handling of three recent events also reflected the fairness of its approach to this matter. The station extensively covered the Moratorium activities in both October and November, doing so by way of hard news, coverage of numerous press conferences and meetings of groups opposing and supporting the war, and extensive coverage of the rallies and demonstrations themselves. For example, among anti-war groups covered were the Vietnam Moratorium Committee, the D.C. Moratorium Committee and the New Mobilization Committee to End the War in Viet-

nam. Among pro-administration groups were Americans for Peace with Freedom, the Freedom Rally Committee, and the Young Americans for Freedom.

WTOP's handling of President Nixon's November 3, 1969, major policy speech on Vietnam is very much in point. After the speech the station presented comments by five leaders generally supporting the President's position—Senators Goldwater, Scott, and Tower and Representatives McCormick and Ford—and six leading critics of the President's policy, men whose own views on war policy presented numerous contrasts as well—Senators McGovern, Gore, Goodell, Mansfield, Aiken, and Percy.

In addition to programming such as the foregoing, WTOP regularly broadcasts *Face the Nation* and *Capitol Cloakroom*—two CBS Network news interview programs on which national leaders are interviewed on a variety of current issues. These two programs have consistently provided opportunities both for supporters and opponents of the President's policy on and actions with regard to Vietnam to voice contrasting views.

With issues as intense and controversial as Vietnam it is not suprising that particular groups may feel that their own views have not been adequately reflected, despite the good faith efforts of the station. However, it is ironic that this complaint of favoritism toward President Nixon's policies in Vietnam would be made against WTOP in view of the allegations of Allen C. Phelps last fall in connection with a complaint against the station that it had been unfair *against* the President's policy in Vietnam— a charge as baseless as the present one and found to be baseless by the Commission in its letter of November 25, 1969.

II. *WTOP's Policy Concerning Spots on Controversial Issues.*

WTOP's policy not to carry spot announcements on the merits of controversial issues is clearly a matter within its responsibility as a licensee. The Commission has often made clear that, so long as a station makes a good faith effort to present contrasting views on an issue, it has no obligation to present the views of any particular spokesman or group, whether it be through free or sponsored material, or in any particular manner. Moreover, WTOP's policy was specifically approved at least twice by the Commission. In a letter to Washington Women's Strike for Peace dated November 22, 1965, concerning the refusal of several Washington stations, including WTOP, to sell paid spot announcements concerning the war in Vietnam, the Commission held that:

> "With respect to the refusal of the station to sell time for spot announcements, under the Communications Act, the selection and presentation of broadcast material are the responsibilities of the individual station licensees, and Section 326 of the Act expressly prohibits the exercise of censorship powers by the Commission . . . .
>
> "Thus, the Act makes it clear that the Commission has no power to require a broadcaster to carry or refrain from carrying any particular program, or to prescribe the content of any program presented over the air. Moreover, Section 3 (h) of the Act provides that '. . . a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.' In *McIntire* v. *Wm. Penn Broadcasting Company*, 151 F. 2nd 597, the U.S. Court of Appeals, Third Circuit, stated, in part, that:
>
> > '. . . As we have indicated, a radio broadcasting station is not a public utility in the sense that

it must permit broadcasting by whoever comes to its microphone.'

"In view of the foregoing, it does not appear that Commission action concerning radio station WTOP is warranted in this instance."

A similar refusal as recently as 1968 was upheld by the Commission in a letter to the Communications Workers of America, dated March 8, 1968.

WTOP's policy against the carriage of spot announcements on controversial issues is based in part on its proper desire to determine, in the exercise of its professional journalistic judgment, the way in which its fairness obligation is discharged on controversial issues. As Mr. Gold's letter to BEM stated, it is the licensee's belief that short spot announcements are not an appropriate medimum to bring before its listeners views on the merits of controversial issues. The actual substantive portion of the BEM spots in question here, for example, is extremely short—ranging from about 20 seconds to 35 seconds by actual timing. By constrast, the commentaries and editorials aired by the station are usually approximately two minutes in duration, and do provide enough time for develpoment of position. Likewise, the station presents longer news interviews on both sides of this issue—running as much as one-half hour—and numerous shorter statements and interviews in the course of its regular news coverage. WTOP feels that in this way constructive dialogue takes place.

III. *Alleged Discriminatory Application of the Station's Policy.*

The BEM complaint charges in effect that WTOP's policy is not consistently applied. The naked assertion on page four of the BEM complaint that: "Brief spot announce-

ments are regularly heard on WTOP on such controversial subjects of public importance as religion, the environment, the national economy, armed forces recruiting and smoking," however, falls far short of supporting, let alone proving, the charge. Any of the myriad types of free public service announcements on a wide range of activities in the community and nation can be thought by some to invoke the Fairness Doctrine—witness the recent question raised in the District of Columbia over public service announcements, supporting the United Givers Fund. Such announcements, however, do not deal with controversial issues of public importance on the merits. Is BEM asking the FCC to rule that an announcement suggesting that people go to the church of their choice raises a fairness issue, when it has declined to give atheists time because stations broadcast religious services? The BEM complaint mentions, but does not elaborate upon, announcements concerning "the environment" and "the national economy." Is BEM suggesting that "Smokey the Bear" and "Keep America Beautiful" announcements advocate positions on controversial issues? Recruiting spots have long been broadcast by nearly all stations, and have never been considered as invoking the Fairness Doctrine. They do not relate to the Vietnam war or take any position on any public issue.[1] As for announcements concerning "smoking," WTOP does not carry cigarette advertising.

It does carry anti-smoking spot announcements in the interest of public health and welfare as it carries consumer reports to help protect the public from fraudulent or deceptive business practices.

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[1] In its letter to Tibor R. Machan of June 12, 1968, the Commission found reasonable a licensee's determination that similar public service announcements—for the Job Corps, the Peace Corps, VISTA and U.S. Savings Bonds—did not raise controversial issues of public importance.

It should be emphasized that BEM is not requesting time to reply to a specific station editorial, nor is it alleging that it was the subject of a "personal attack." It is merely asserting a right to purchase spot announcements to air its views on a controversial issue of public importance regardless of the station's judgment as to how such an issue is most appropriately covered and even though it has not shown that the station does not adequately cover contrasting views on this issue in its programming. Such a view is simply out of line with the Commission's long-standing interpretations of the Fairness Doctrine. Moreover, we are advised by our counsel that, contrary to the argument in BEM's complaint, the First Amendment does not require WTOP to present these announcements and the *Red Lion* case does not apply in these circumstances.

Respectfully submitted,

/s/ Larry H. Israel
LARRY H. ISRAEL
President, Post-Newsweek
Stations, Capital Area, Inc.

cc: Asher & Schneiderman
Attorneys for Complainant

LAW OFFICES
ASHER & SCHNEIDERMAN

Thomas R. Asher
Michael Schneiderman

1320 Nineteenth Street, N. W.,
Washington, D. C. 20036
(202) 223-1491

• Not Admitted in the District of Columbia

February 16, 1970

Mr. William B. Ray
Chief, Complaints and Compliance Division
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Ray:

On January 22, 1970, Business Executives Move for Vietnam Peace ("BEM") filed a Letter of Complaint with you concerning refusal of radio station WTOP to broadcast its spot announcements expressing opposition to the Vietnam War. On February 5, 1970, WTOP filed its response; the response was received by BEM on February 9, 1970. This letter is a reply to WTOP's response.

I. *The Public's Right to Hear*

WTOP's response is drafted solely in traditional Fairness Doctrine terms and fails to confront the critical claim in BEM's Complaint. It ignores the public's right to hear BEM's announcements, and BEM's right to broadcast them regardless of whether WTOP had already broadcast views on the Vietnam War. WTOP further ignores the fact that these rights of access are especially applicable to a radio station whose all news format makes it a peculiarly appropriate medium for communicating information and ideas.

The public's right of access derives from the reasoning in *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367

(1969), and recent authority interpreting the first amendment such as *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). WTOP in declining to address these substantial issues and citing solely advice of counsel, would have the Commission disregard the substantial developments in both broadcast law and first amendment law in recent years.

WTOP's response merely copies the standard Commission form letters used to reject Fairness Doctrine complaints, which rely upon § 326 of the Communications Act, § 3(h) of that Act, and *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945). These three chestnuts are regularly relied upon in the Commission's letters. See, e.g., *Letter to Washington Women's Strike for Peace*, November 22, 1965; *Letter to Joseph A. Beirne, President, Communications Workers of America*, March 8, 1968; *Letter to Stanley Fleishman*, February 12, 1969; *Letter to A. F. Grospiron, President, Oil, Chemical and Atomic Workers International Union*, June 6, 1969. WTOP's response is mere parrotting of those F.C.C. letters.

However, the law has undergone much change since the Commission began relying on *McIntire*. The public today, in contrast to 1945, has a clearly established right of access to broadcast and hear editorial advertisements on commercial radio and television stations.

> The editorial advertisement [is an] important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. *New York Times* v. *Sullivan*, 376 U.S. 266 (1964).

As the law has progressively broadened the public's right to communicate via the mass media, it necessarily

has narrowed the reliance which the Commission can rightly place on such precedents as *McIntire* and § 3(h) for the proposition that what a licensee chooses to broadcast is purely the licensee's business. Whatever those authorities may once have meant by declaring that a licensee was not a "common carrier" or a "public utility", they plainly do not today mean that public access to the air waves is a right to be defined by the whims and prejudices of broadcasters. The 1959 amendment to § 315 of the Communications Act, and the legislative history behind it reviewed in *Red Lion*, makes this clear. "The argument that a broadcaster is not a public utility is beside the point. . ." *United Church of Christ*, 359 F.2d 994, 1003 (D.C. Cir. 1966). These obligations may not make WTOP a "common carrier" in the sense that its rates may be regulated or its programming content prescribed by the Commission.[1] However, these obligations to the public do require that WTOP give access to its airtime to persons wishing to express views to the public, especially when those persons are willing to pay WTOP at its going rate.[2]

These obligations to the public, although owed by all licensees, are peculiarly applicable where a broadcaster postures itself as a communicator of information and ideas. A station that holds itself out as the Twentieth Century's equivalent of the town public bulletin board or the town crier cannot censor ideas. WTOP, as an "all news" station, has an obligation which may exceed the obligation of other radio stations to provide the public with a ready means to broadcast editorial advertisements; c.f. *New York Times, supra.*

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[1] Thus, the § 326 prohibition against "censorship".

[2] BEM does not contest WTOP's right to deny access for such technical reasons as lack of available advertising time or mechanical defects in the announcements.

Nor can the Commission ignore, as WTOP has, the fact that WTOP is a government licensee and, as such, has special obligations under the first amendment. BEM's announcements relate to official government policy. WTOP's suppression of them, with government approval, offends the first amendment as much as if the government, itself, had engaged in direct censorship.[3]

The right claimed here by BEM, for itself and the public, derives from the same principle which spawned the Fairness Doctrine. But it is not a right which can be quashed by the sort of simple Fairness Doctrine response which WTOP has filed. The Commission must look to the laws and their interpretation by the U.S. Courts, not to the advice of WTOP's counsel, to determine its legal obligations.

II. *WTOP's Irrational "Policy" is Arbitrarily Applied*

BEM's announcements were rejected solely on the basis of WTOP's "policy" that controversial subjects of public importance "require a more in-depth analysis than can be provided in a 10, 20, 30, or 60-second announcement." [4] Yet, WTOP does not adhere to its own rule.

WTOP congratulates itself for carrying anti-smoking announcements (WTOP Response, p. 7). If the asserted "more than one minute" rule were, in fact, WTOP's policy, these announcements would be banned, just as BEM's have been banned. The anti-smoking announcements deal with a controversial subject of public importance; the Commission has so held. *Television Station WCBS-TV*, 8 F. C. C. 2d 381, 382 (1967). These announce-

[3] Cf. *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U.S. 308 (1968); *Marsh* v. *Alabama*, 326 U.S.

[4] See Letter to Robert Maslow from Daniel E. Gold, January 7, 1970, attached to BEM's Complaint.

ments are 60 seconds or less in length. Yet WTOP regularly carries them.

WTOP also congratulates itself for extensive "all news" coverage. Its "news" broadcasts carry countless statements of position on controversial subjects of public importance which occupy segments of 60 seconds or less. Even the news panel programs carried by WTOP frequently contain short statements by the guest on controversially important subjects which are less than 60 seconds in length. While WTOP's editorials are indeed often two minutes long, a substantial portion of this time is sometimes consumed in stating the underlying facts. The actual statement of position in such editorials consumes substantially less than two minutes. Therefore, its own editorials violate the station's policy.[5]

WTOP'S policy is not only unevenly applied, it is irrational on its face. It takes no account of the varying complexity of issues, of the particular viewpoint expressed, or of the manner of presentation. It is sufficiently irrational that it can be entirely avoided by a simple decree that a subject is "noncontroversial". An announcement entirely adequate one day would not have sufficient "in-depth analysis" the next if, overnight, WTOP discovered controversy about it.[6]

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[5] A statement of the facts on the Vietnam War is, in contrast, not necessary. These facts are *known*.

[6] WTOP's classification of announcements recruiting young men to serve in the armed forces is a good example. Today it is classed by WTOP as "noncontroversial" (WTOP Response, p. 6), and therefore 60-second announcements have sufficient depth to be acceptable to WTOP. But WTOP may be wrong. It surely is wrong in light of the widespread public dissent and debate over military recruiting and service. If WTOP someday discovers the controversy, the 60-second recruiting announcements will no longer adequately discuss their subject.

Upon legal and factual analysis, WTOP's "policy" evaporates with two consequences: (1) WTOP's counsel and the Commission must directly confront BEM's right to access; and (2) WTOP must acknowledge that it asserts a naked right to control access to its air. Even if such a right existed, it could not be applied discriminatorily, favoring some speakers and silencing others solely on the basis of the views they wish to express.

III. *Fairness Doctrine*

BEM has spelled out a clear violation of the Fairness Doctrine. It has specifically identified the views which it wishes to answer: the views of the administration, the military and their supporters on the Vietnam War. WTOP, in its response to BEM's Complaint, admits that these views have been presented in depth and lists other speakers whose views have been presented. But it does not claim to have broadcast BEM's views.

BEM states that its particular views in opposition to the administration's policy—the special views of businessmen and military leaders—have not been presented on WTOP. Of course, BEM cannot *prove* the negative, for it is WTOP which has the program logs and other material necessary to do so. However, WTOP has cited no evidence and made no response to the claim.

The War has more than two sides. The examples of views which WTOP has aired (WTOP Response pp. 2-3) prove this. The Fairness Doctrine is not satisfied by presentation of a limited number of sometimes only slightly differing positions on this War. BEM claims the right, under Commission Doctrine, to broadcast its views on the War in answer to the views of the administration, the military, and others already broadcast on WTOP.

If WTOP's unfairness is not found to be evident from the letters now on file with the Commission, additional

evidence must be obtained from WTOP. Remaining questions of fact in this area can be resolved fairly only if BEM is permitted to inspect WTOP's program logs and relevant additional materials. The Commission should not resolve the Fairness Doctrine question against BEM without first ordering such discovery.

* * * *

BEM seeks enforcement of its right to broadcast editorial advertisements on WTOP, and of the concomitant right of the public to hear those advertisements. These rights, although based on the principles which require the Fairness Doctrine, exist independent of that Doctrine. Access to WTOP for BEM's announcements must, therefore, be guaranteed. The fact that WTOP has not complied with the Fairness Doctrine is an additional ground for relief.

Respectfully submitted,

/s/ Thomas R. Asher
THOMAS R. ASHER

/s/ Michael Schneiderman
MICHAEL SCHNEIDERMAN
1320 Nineteenth St., N.W.
Washington, D.C. 20036

/s/ Albert H. Kramer
ALBERT H. KRAMER
Citizens Communications Center
1816 Jefferson Place, N.W.
Washington, D.C. 20036

cc: Larry H. Israel
President, Post-Newsweek
Stations, Capital Area, Inc.

February 19, 1970

Mr. William B. Ray
Chief, Complaints and Compliance Division
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20036

Attention: Milton O. Gross, Esq.
Re: 8330-F1A
C1-1178

Dear Mr. Gross:

On behalf of Business Executives Move for Vietnam Peace ("BEM"), we request that the above matter be referred directly to the Commission.

The questions raised by BEM's Complaint involve basic Commission policy on a matter of great public importance which eventually must be ruled upon by the Commission and the Courts. If the Complaints and Compliance Division refuses the relief which BEM seeks, BEM will request review by the full Commission and, if turned down by the Commission, BEM will seek judicial relief. Therefore, in order to avoid delay, we respectfully request that the Complaints and Compliance Division forward this matter to the full Commission for initial disposition at that level.

We further request that the Commission rule upon BEM's Complaint within three weeks. Expedited treatment is particularly appropriate in a case such as this: with every day BEM is barred from WTOP's air waves, it and the public suffer irrevocable loss.

Yours sincerely,

THOMAS R. ASHER

cc: Mr. Larry H. Israel
President, Post-Newsweek Stations
Capital Area, Inc.

Ernest W. Jennes, Esq.
Covington & Burling

COVINGTON & BURLING
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Hamilton Carothers
J. Randolph Wilson
Roberts B. Owen
Edgar F. Czarra, Jr.
William H. Allen
David B. Isbell
John B. Jones, Jr.
H. Edward Dunkelberger, Jr.
Brice McAdoo Clagett
John S. Koch
Peter Barton Hutt
Herbert Dym

Dean G. Acheson
John G. Laylin
Fontaine C. Bradley
Edward Burling, Jr.
Joel Barlow
Donald Hiss
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Nestor S. Foley
Daniel M. Gribbon
Harry L. Shniderman
Don V. Harris, Jr.
William Stanley, Jr.
Weaver W. Dunnan
Edwin M. Zimmerman
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February 24, 1970

Mr. William B. Ray, Chief
Complaints and Compliance Division
for Chief, Broadcast Bureau
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: 8330-F1A
C1-1178

Dear Mr. Ray:

This letter is written on behalf of WTOP in response to the request of Business Executives Move for Vietnam

Peace (BEM), dated February 19, 1970, for immediate reference to the Commission of its pending complaint against WTOP.

WTOP takes no position on the question whether the Complaints and Compliance Division should follow its normal procedures in this case or refer this matter directly to the Commission. The fact that the express purpose of BEM is to seek judicial review, however, should be irrelevant to the orderly disposition of this matter.

As to the suggestion that BEM has suffered or will suffer irrevocable loss as a result of its inability to broadcast its short spot announcements over WTOP, the following should be noted. First, BEM asked to buy time from WTOP for such announcements in June, 1969, and apparently did not decide to lay the base for a judicial appeal by filing a formal complaint with the Commission until some seven months later, in January, 1970. Second, in addition to WTOP, there are 6 AM and 11 FM radio stations licensed to Washington, D.C., and an additional 17 AM and 8 FM stations licensed to other communities in the metropolitan area and serving Washington. According to a story appearing in the Washington *Star* on February 17, 1970, BEM's spot announcements have been accepted by five area stations—WDON, WQMR, WGAY, WHFS and WGTV—and rejected by two others in addition to WTOP—WRC and WWDC. Accordingly, it is rather difficult to see how the failure of the organization to purchase time for its short announcements on WTOP is an "irrevocable loss" to BEM, let alone to the public—the latter especially in view of the fact that varying facets of the Vietnam matter have frequently been aired over WTOP and other local and area stations.

In view of certain points made in BEM's reply of February 16, 1970, it is our intention to submit to the Commission an additional statement regarding this mat-

ter, which, barring unforeseen circumstances, will be filed on February 27, 1970.

Any questions with respect to this matter should be directed to the undersigned.

Respectfully submitted,

ERNEST W. JENNES

Attorney for
Post-Newsweek Stations,
Capital Area, Inc.

cc. Milton O. Gross, Esq.
Asher & Schneiderman
Attorneys for Complainant

February 26, 1970

Mr. William B. Ray
Chief, Complaints and Compliance Division
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20036

Re: 8330-F1A
C1-1178

Dear Mr. Ray:

By letter, dated February 24, 1970, WTOP has informed you of its intent to file an extraordinary response to BEM's reply. The Business Executives Move for Vietnam Peace (BEM) objects to the filing of additional letters in this matter by WTOP.

WTOP's proposed filing is a bald attempt to further delay these proceedings. BEM raised no new issues in its reply; the discussion of the legal and constitutional right of access merely develops points in BEM's complaint which WTOP and its counsel chose to disregard in their reply. WTOP has apparently changed its mind and now seeks to disrupt and delay these proceedings by filing another document which may, in turn, require BEM to file an additional reply.

WTOP files even this unauthorized document late. Whereas, under your letter of January 26, 1970, BEM was limited to seven days to respond to WTOP's answer, WTOP arrogates to itself eleven days to make its extraordinary filing. Furthermore, it is difficult to see why WTOP waited until more than one full week after the filing of BEM's reply to notify the Commision—and BEM—of its intent to file an extraordinary document, unless it was an attempt to preclude an effective objection by BEM.

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Any questions with respect to this matter should be directed to the undersigned.

Respectfully submitted,

ERNEST W. JENNES

Attorney for
Post-Newsweek Stations,
Capital Area, Inc.

cc. Milton O. Gross, Esq.
Asher & Schneiderman
Attorneys for Complainant

February 26, 1970

Mr. William B. Ray
Chief, Complaints and Compliance Division
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20036

Re: 8330-F1A
C1-1178

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WTOP effronts the Commission's procedures to seek delay. If its proposed letter is accepted for filing by the Commission, WTOP will achieve its objective. Such tactics by a licensee and its counsel should be condemned and WTOP's forthcoming letter should be rejected by the Commission.

Respectfully submitted,

THOMAS R. ASHER

MICHAEL SCHNEIDERMAN
1320 Nineteenth Street, N.W.
Washington, D.C. 20036

ALBERT H. KRAMER
Citizens Communications Center
1816 Jefferson Place, N.W.
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cc: Larry H. Israel
President
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February 27, 1970

Mr. William B. Ray, Chief
Complaints and Compliance Division
for Chief, Broadcast Bureau
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: 8330-FIA
C1-1178

Dear Mr. Ray:

WTOP's response to the complaint of Business Executives Move for Vietnam Peace (BEM) did not rely exclusively on "traditional" Fairness Doctrine arguments, as alleged by BEM. WTOP showed that it has gone far beyond its Fairness Doctrine responsibilities which require that if a station presents a point of view on a controversial issue of public importance, it must present contrasting views. WTOP has devoted substantial time to the Vietnam issue using its news judgment as to how this coverage should be handled. In so doing, it has sought out and broadcast a wide spectrum of views on the Vietnam issue. Accordingly, WTOP cannot be found derelict in meeting its public service responsibilities, which it recognizes wholly apart from any requirement of law. Surely it was not enough for BEM—as it did in its February 16, 1970, letter to you (hereinafter BEM Reply)—merely to repeat its assertion that WTOP's cov-

erage of the Vietnam issue has not been balanced and to call for an investigation.[1]

But BEM has really shifted the main burden of its argument, or perhaps its reply has articulated its position more clearly. BEM's counsel have abandoned, as they must, their naked allegation that WTOP has been unfair in the treatment of the Vietnam issue although they reiterate their early wholly unsupported rhetoric that WTOP is "favoring some speakers and silencing others on the basis of the views they wish to express." BEM Reply, p. 5. BEM's reply now makes clear that it is *not* primarily concerned with the *right of the public to hear* a balanced spectrum of views on Vietnam, but rather with *its own alleged right, as an organization,* to use WTOP's facilities to speak on Vietnam, regardless of whether the views it wants to express have already been expressed in WTOP's news, information and public affairs programming (BEM Reply, p. 1). The 20-35 second[1] "sample" statements on Vietnam that BEM wanted aired in its name are attached to the complaint. The FCC will see that these views or attitudes or assertions are among the most common and repeated objections to United States policy in Vietnam. *They are not different or contrasting views.* Thus, BEM's position emerged as a novel and profoundly disturbing one which, because of its far-reaching implications, warrants further comment.

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[1] BEM says that if it has not shown that WTOP has been unfair additional evidence must be obtained from WTOP and has volunteered to inspect relevant additional materials. BEM Reply, p. 5. In the last year alone WTOP has broadcast some 8,400 hours of news and information programming. BEM cannot seriously suggest that its flimsy allegations warrant an investigation of the tapes of WTOP's programs by it and ultimately by the FCC.

[1] See letter, Israel to Ray, February 5, 1970, p. 5, for length of "substantive portions."

I.

BEM would have the Commission declare that where any controversial issue of public importance is concerned broadcast stations must provide time to any interested group to express its view on that issue, regardless of whether the view has already been expressed over the station by others or by the station itself in its programming.

(1) Any such doctrine would be wholly impractical and impose an impossible burden on broadcast stations, to say nothing of the suffering public. Consider, for example, the number and variety of groups which could insist on expressing their views on the Vietnam issue alone (and BEM's position applies to every controversial issue of public importance)—the American Legion, the Students for a Democratic Society, United We Stand, the Youth International Party (Yippies), the John Birch Society, the Ripon Society, the Southern Christian Leadership Conference, SANE, the Veterans of Foreign Wars, the New Mobilization Committee to End the War in Vietnam, the Daughters of the American Revolution, the Americans for Democratic Action, the National Council of Churches, the Fleet Reserve Association, the Navy League and the Air Force Association, to name only a few. Moreover, on issues such as Vietnam and other important public issues there are literally innumerable ad hoc organizations (like BEM itself) that come into being to attempt to influence public opinion or government policy or both.

Consider further the number of such burning issues about which organizations or individuals want to speak, and the indiscriminate sweep of the doctrine advanced by BEM becomes even more appalling. Moreover, this complaint was filed against WTOP, although five other Washington area stations accepted BEM spot announce-

ments and two (WRC and WWDC) rejected them.[1] Thus, the question is not even one of access to *some* broadcast station—*each* organization should have an enforceable right to speak on each station! The only limitation would be the size of the group's pocketbook. In the Washington metropolitan area alone, this would involve 43 different AM and FM radio stations! In the United States as a whole there are about 4,300 AM, 850 TV and 2,500 FM stations. Just where does the BEM doctrine stop?

(2) Such a policy would hardly serve the public. It would require the broadcast of duplicative views and indeed, in view of the expansive definition of a controversial issue of public importance in BEM's two letters to the Commission,[2] even views on trivial issues. Moreover, it would encourage the sort of "hard-sell" approach to public issues which is least likely to contribute to public understanding.

(3) Such an approach would impede a fair and balanced presentation of public issues. In contrast to what is contemplated by the Fairness Doctrine, the expression of views would become dominated by wealthy and powerful groups or individuals. If both could purchase time up to the limits of their financial capacity, which would be heard more often on the Vietnam issue, the voice of an organization with little money or one with unlimited financial resources? Should exposure of viewpoints on a public issue be subject to an auction with the greatest exposure going to the groups willing and able to spend the most? WTOP thinks not. Today the broadcaster exercises his professional judgment, subject to the Fairness Doctrine, to ensure that such inequities do not occur.

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[1] *Evening Star*, February 17, 1970, p. C-4.

[2] BEM Complaint, January 22, 1970, p. 4; BEM Reply, p. 4.

(4) Finally, the broadcaster's freedom of the press—to judge the importance of issues and to determine how to present them to the public—would be abridged by such a doctrine. Efforts of stations like WTOP, which broadcasts only news, information and public affairs programs, to present issues to the public in a fair, balanced and understandable way would be totally disrupted by a cacaphony of redundant views paid for by a variety of groups and individuals with axes to grind. Broadcast journalism could not perform its vital function in such a context.

II.

Under the Communications Act, as consistently interpreted by the Commission and the courts, it is the licensee's responsibility to operate in the public interest. The broadcaster is not a common carrier. Proposals to the contrary have been specifically rejected by the FCC and the Congress, especially as to public issues. The licensee is expected to treat public issues of concern to his listeners and to provide a reasonable opportunity for contrasting views on the issues to be heard. This obligation has traditionally, and correctly, been interpreted as *issue-oriented.* That is, it is the right of the public to *receive* fair and balanced presentation of the issues, *not* the right of any particular person or group to *express its view,* which is paramount. The Commission made these points crystal clear in its classic formulation of the Fairness Doctrine—the 1949 Report on Editorialization by Broadcast Licensees:

> "Congress has recognized that the requests for radio time may far exceed the amount of time reasonably available for distribution by broadcasters. It provided, therefore, in Section 3(h) of the Communications Act that a person engaged in radio broadcasting shall not be deemed a common carrier." 13 FCC 1246, 1247 (1949).

The Commission went on to say:

> It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public *to broadcast his own particular views on any matter*, which is the foundation stone of the American system of broadcasting." *Id.* at 1249 (emphasis added).
>
> * * * *
>
> "The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, *whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time*, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request." *Id.* at 1251-52 (emphasis added).

BEM thus seeks to shift the historic focus of the Commission's Fairness Doctrine, and of the First Amendment, from the issue or idea being expressed to the identity of the speaker.

III.

What legal support is offered for the proposition that BEM, as such, has a right to be heard? BEM asserts that its new doctrine is supported by recent cases interpreting the First Amendment.[1]

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[1] BEM's citation of *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), for the proposition that the First Amendment demands

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969), far from supporting a common-carrier approach, supports the Commission's view of the licensee's responsibility, and WTOP's position that it is not BEM's right to broadcast but the public's right to know that is crucial. Nowhere did the Court state that an advocate of a view on a public issue has a right to express it on a broadcast station. On the contrary, it recognized the traditional responsibility of the broadcaster to ensure through the exercise of his professional judgment that contrasting views are presented.

> "To condition the granting or renewal of licenses on a willingness to present *representative* community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgement of freedom of speech and freedom of the press." *Id.* at 394 (emphasis added).

Indeed, in distinguishing between the general fairness obligation, from which the personal attack and candidate endorsement policies and rules under attack were derived, and these *particular* policies and rules themselves, the Court noted:

> "These obligations differ from the general fairness requirement that issues be presented, and presented with coverage of competing views, in that the broad-

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an absolute right of access for all groups or individuals is puzzling. That case dealt only with the question whether, absent actual malice, the *voluntary* publication by a newspaper of an advertisement containing defamatory material concerning a public official was libelous. The issue was not the legal *right* of the group whose names were on this advertisement to insist that a newspaper publish the material; that question was not even involved in the case. The Court's comment quoted on page 2 of the BEM Reply was part of its discussion of the question whether the defamatory statements lost First Amendment protection because they were in an advertisement.

> caster does not have the option of presenting the attacked party's side himself or choosing a third party to represent that side." *Id.* at 378.

It is in this connection and in this connection only that the Supreme Court said:

> "There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." *Id.* at 389.

The Court expressly recognized that the Congress had not imposed common-carrier status on broadcast licensees (*Id.* at 390-91) and that the only obligations to allow *particular* persons to broadcast over a station (other than the Section 315 political broadcast equal time requirement) were imposed in connection with personal attacks and political editorials—not at issue here.

The Court's concern was *not* over the access of individuals or groups *to speak*, but the right of the public at large to have access *to ideas* through broadcasting.

> "It is the right of the public to receive suitable *access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.*" *Id.* at 390 (emphasis added).

BEM argues further that WTOP's rejection of its announcements (or presumably the announcements of any other group or person) even though fair and reasonable, becomes an offensive act of censorship under the First Amendment if the FCC finds that WTOP's action was not inconsistent with the Fairness Doctrine. We submit that BEM's use of the words "with Government approval" in this connection (BEM Reply, p. 3) is an exercise in

semantics which does not create a First Amendment issue or right where one would not otherwise exist. The FCC's regulatory power in this area is limited to a determination whether the broadcaster has acted in good faith and has been fair. It has nothing to do with what official Government policy happens to be. The citation by BEM of the *Marsh* and *Logan Valley Plaza* cases is wholly inapposite. There the questions were whether private ownership of property used for public purposes affected the First Amendment rights to distribute religious literature and to engage in informational picketing which the persons involved in those activities admittedly would have had if the property had been publicly owned. The Supreme Court in *Red Lion* did not hold that a privately owned, licensed station has the attributes of a public street, which was the case of the company town in *Marsh* and the shopping center in *Logan Valley*. It recognized that protection of First Amendment rights in broadcasting is accomplished by the responsibility of broadcasters to treat public issues and to do so consistent with the Fairness Doctrine.

The late Professor Meiklejohn expressed the fundamental point well, when he said that "What is essential is not that everyone shall speak, but that everything worth saying shall be said." [1] The Commission's Fairness Doctrine, fully implemented by WTOP in this instance, furthers that crucial end.

IV.

One other point raised by BEM's reply warrants brief comment. BEM argues for the first time that WTOP's news and information format is a further reason why it be required to sell time to BEM. Surely the conclu-

[1] A. Meiklejohn, Political Freedom: The Constitutional Powers of the People, 25 (1960).

sion is exactly the opposite. BEM's conception of the station's programming as "the town public bulletin board or the town crier" (Reply, p. 3) wholly misconceives the programming, purpose and role of the station. WTOP provides a news service interspersed with information features, interviews on public issues, and similar programming. This is a journalistically professional presentation of local, regional, national and international issues. Given the great multiplicity of views presented through such a format, it would seem that WTOP would be the last station upon which would be imposed a special requirement that *particular* spokesmen or organizations be heard.

V.

BEM's request for a far-reaching change in broadcaster responsibilities should be denied. If it is not denied, the Commission will recognize that because of its enormous implications and application it should not even be seriously considered except after a broad inquiry, with full opportunity of all broadcasters and all other interested persons and groups to express their views and submit pertinent information.

Respectfully submitted,

ERNEST W. JENNES
JOHN C. ROBERTS
Attorneys for WTOP

CC: Asher & Schneiderman (By Messenger)
Attorneys for Complainant
Albert H. Kramer, Esq. (By Mail)
Milton O. Gross, Esq.

COVINGTON & BURLING

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(202) 293-3300

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February 27, 1970

Mr. William B. Ray, Chief
Complaints and Compliance Division
for Chief, Broadcast Bureau
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: 8330-F1A
C1-1178

Dear Mr. Ray:

WTOP, by its counsel, feels constrained to reply to the letter from BEM's counsel to the Commission dated February 26, 1970, in view of both the letter's tone and its substance. BEM is apparently unaware that in dealing with letter complaints of this nature, technical procedural rules regarding the timing or number of pleadings have not generally been followed by the Commission. This is not a pernicious practice but rather one that has served the interests of the public, the Commission, complainants and those complained against. The materials which may be submitted in such matters have long been governed by the need to place relevant facts and pertinent arguments before the members of the Commission's charged with making initial evaluation of the complaint. Indeed, where time is of the essence inquiries by Commission staff of both sides for information may be even be made by telephone or telegram to permit expedited action.

Counsel for WTOP obtained a copy of BEM's reply dated Monday, February 16, 1970, from the offices of

BEM's counsel on Wednesday, February 18. Noting that BEM had shifted the main burden of its complaint to a ground either not in its initial letter or not clearly articulated in it—a right of access regardless of station coverage of the issue—and that at least one new issue had been presented—an alleged special obligation of an all-news and information station—WTOP's counsel saw that further comment on this matter might be necessary. WTOP's counsel communicated with your office to determine whether processing of the matter would be delayed by a further letter, and was told it would not if filed by February 27. On Monday of this week, February 23, which was a government holiday, the undersigned received BEM's letter dated February 19, 1970, requesting immediate Commission consideration of its complaint. On the next day (which was the first working day) we filed a letter in reply to the request, stating also that, in view of certain points made in BEM's February 16 letter, we intended to submit an additional statement on February 27. This was only six days after receipt of BEM's reply, and the next business day (in view of the holiday—February 23) after it was decided to file a further statement, on February 20.

WTOP is as anxious as BEM for speedy resolution of its letter complaint. But surely if BEM could wait seven months to file that letter complaint after its request was rejected, it can now allow adequate time for the development of facts and arguments in this matter, and to allow the members of the Commission's staff expert in such questions to consider them under their normal procedures.

A further letter on this matter dealing with points made in BEM's letter of February 16, is being filed together herewith. It will be noted that this is but 6 working days since undersigned counsel obtained a copy of BEM's letter from BEM's counsel—hardly a "disruption" of FCC pro-

cedures, a "delaying" tactic or otherwise warranting the *ad hominem* language in counsel's letter of February 26, if, indeed, such language is ever warranted.

Respectfully submitted,

ERNEST W. JENNES
JOHN C. ROBERTS
Attorneys for WTOP

cc: Asher & Schneiderman (By Messenger)
Attorneys for Complainant
Albert H. Kramer, Esq. (By Mail)
Milton O. Gross, Esq.

March 6, 1970

Re: 8330-F1A
C1-1178

Mr. William B. Ray
Chief, Complaints and Compliance Division
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Ray:

The Business Executives Move for Vietnam Peace ("BEM") regrets the necessity to file still another letter in this matter. However, the improper second response of WTOP leaves BEM little choice. We shall restrict this letter to several brief points.

1. WTOP claims the unfettered power to arbitrarily bar editorial advertisements on controversial issues of public importance. BEM simply claims that a licensee of the public's airwaves cannot be permitted this power to foreclose a form of expression which the Supreme Court has found to be "an important outlet for the promulation of ideas and information." *New York Times* v. *Sullivan*, 376 U.S. 254, 296 (1964).

2. Section 315 of the Communications Act, *New York Times*, and *Red Lion Broadcasting Co.* v. *FCC* 195 U.S. 357 (1969) establish the public's right to have a mass media which is available for statements of position on important issues. It is no answer to these recent cases to rely on statements of Commission policy issued more than 20 years ago. WTOP's attempt to distinguish *Red Lion* and *New York Times* on their facts cannot obscure the substantial right which they define. Whatever the precise

boundaries of that right, the public cannot be consigned to hearing only the views of spokesmen and editors chosen by the licensee.[1]

3. WTOP devotes more than half of its second response to a supposed distinction between the public's right to hear issues and BEM's right to present its views. WTOP maintains that it alone should decide what issues the public shall hear and what spokesman shall present varying views on those issues. WTOP then claims the power to bar any other persons wishing to speak to its audience. This is censorship and, in this case, censorship of criticism of the Government under whose license WTOP operates.[2]

4. WTOP worries that, if stations must sell air time for issue-oriented advertisements, editorial advertising will be dominated by wealthy speakers. But this is what commercial broadcasting is all about; he who can afford it buys time, be it for commercial, political, or other purposes. Even under the Fairness Doctrine, response time goes to the highest bidder, since licensees are free to select those advocates of contrasting viewpoints who are

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[1] The relevance of the principle in *New York Times* upon which BEM relies has been recognized by the Commission. *In the Matter of Broadcasting of Information Concerning Lotteries*, FCC 70-210 (March 2, 1970) p. 5.

[2] As licensee of the Government, WTOP has the same obligation to avoid denying Constitutional rights as if it were an agent of the Government; see *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961).

able to pay. See *Letter to Cullman Broadcasting Co.*, FCC 63-849 (Sep. 18, 1963).

Respectfully submitted,

THOMAS R. ASHER

MICHAEL SCHNEIDERMAN
1320 Nineteenth Street, N.W.
Washington, D.C. 20036
(202-223-1491)

ALBERT H. KRAMER
Citizens Communications Center
1816 Jefferson Place, N.W.
Washington, D.C. 20036

cc: Larry H. Israel
Ernest W. Jennes

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

March 31, 1970

In Reply Refer To:
8330
Cl-1178

In re: Complaint of Business Executives Move for Vietnam Peace against Station WTOP

Ernest W. Jennes, Esq.
Covington & Burling
701 Union Trust Bldg.
Washington, D.C. 20005

Dear Mr. Jennes:

We have considered the material submitted in connection with the above complaint. Before resolving the matter, we believe that it would be helpful if one aspect were clarified, namely, whether Station WTOP has presented the viewpoints embodied in the complainant's announcements (obviously by other than the complainants). In order not to delay this matter further and since what is sought is only this one clarification, your response should be submitted by April 7, and served upon the complainant on that day. The complainant may reply, if it desires, by April 14; the matter thereafter will be promptly presented to the Commission for resolution.

Sincerely yours,

/s/ William B. Ray
WILLIAM B. RAY, CHIEF
Complaints and Compliance Division for Chief, Broadcast Bureau

cc: Asher & Schneiderman

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

John Lord O'Brian
Newell W. Ellison
H. Thomas Austern
Howard C. Westwood
Charles A. Horsky
Hugh B. Cox
J. Harry Covington
W. Crosby Roper, Jr.
James H. McGlothlin
Ernest W. Jennes
Stanley L. Temko
James C. McKay
John W. Douglas
Hamilton Carothers
J. Randolph Wilson
Roberts B. Owen
Edgar F. Czarra, Jr.
William H. Allen
David B. Isbell
John B. Jones, Jr.
H. Edward Dunkelberger, Jr.
Brice McAdoo Clagett
John S. Koch
Peter Barton Hutt
Herbert Dym

Dean G. Acheson
John G. Laylin
Fontaine C. Bradley
Edward Burling, Jr.
Joel Barlow
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John T. Sapienza
Nestor S. Foley
Daniel M. Gribbon
Harry L. Shniderman
Don V. Harris, Jr.
William Stanley, Jr.
Weaver W. Dunnan
Edwin M. Zimmerman
Jerome Ackerman
Henry P. Sailer
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Telephone: (202) 293-3300
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April 3, 1970

Mr. William B. Ray, Chief
Complaints and Compliance Division
for Chief, Broadcast Bureau
Federal Communications Commission
1919 H Street, N.W.
Washington, D.C. 20554

Re: 8330
C1-1178

Dear Mr. Ray:

Submitted herewith on behalf of Post-Newsweek Stations, Capital Area, Inc., licensee of standard broadcast station WTOP, Washington, D.C., is the affidavit of an

official of the licensee in response to your request for clarification dated March 31, 1970, relating to the complaint of Business Executives Move for Vietnam Peace (BEM) against station WTOP.

Any questions with respect to this matter should be directed to the undersigned.

Respectfully submitted,

Ernest W. Jennes

Attorney for Post-Newsweek Stations, Capital Area, Inc.

Enclosure
cc: Asher & Schneiderman (with enclosure—by hand)

AFFIDAVIT OF JAMES L. SNYDER

WASHINGTON)
) ss.
DISTRICT OF COLUMBIA)

James L. Snyder, being first duly sworn, deposes and says:

1. I have been Executive Editor of WTOP Radio since January, 1969. My position entails general supervision of and responsibility for the news and information programming of WTOP. Prior to my employment by Post-Newsweek Stations I was Washington Producer for the CBS Evening News and earlier was Chief of the Westinghouse Broadcasting Company's Washington Bureau.

2. I have examined the spot announcements proposed to be broadcast over WTOP by Business Executives Move for Vietnam Peace (BEM) and attached to a letter from BEM's counsel to the Federal Communications Commission dated January 22, 1970. Based upon my daily supervision and general direction of the news gathering operations and the presentation of news and information by station WTOP since March, 1969, I am able to state of my own knowledge that each of the viewpoints embodied in the BEM announcement has been expressed on a number of occasions in various types of broadcasts over WTOP by critics of the Vietnam War other than the complainants.

/s/ James L. Snyder
JAMES L. SNYDER

SUBSCRIBED AND SWORN to before me, a Notary Public, this 3rd day of April, 1970.

(SEAL) /s/ [Illegible]
Notary Public
My commission expires April 30, 1972

April 7, 1970

Mr. William B. Ray
Chief, Complaints and Compliance Division
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C.

Re: 8330-F1A
C1-1178

Dear Mr. Ray:

Business Executives Move for Vietnam Peace ("BEM") has reviewed your letter of March 31, 1970, addressed to WTOP seeking clarification, and WTOP's filing of April 8, 1970, which purports to respond. WTOP has supplied no new or clarifying information. The affidavit simply restates broadly what WTOP has already made clear: it thinks it has already presented BEM's views. BEM has already responded to this conclusory claim. In the absence of a contribution of new facts by WTOP, BEM makes no further response at this time.

Respectfully submitted,

THOMAS R. ASHER

MICHAEL SCHNEIDERMAN
1320 Nineteenth Street, N.W.
Washington, D.C. 20036
202-223-1491

bcc: Al Kramer
Bob Maslow

ALBERT H. KRAMER
Citizens Communication Center
1816 Jefferson Place, N.W.
Washington, D.C. 20036

cc: Ernest W. Jennes, Esq.
Covington & Burling

LAW OFFICES

ASHER & SCHNEIDERMAN

Thomas R. Asher
Michael Schneiderman

1320 Nineteenth Street, N. W.,
Washington, D. C. 20036
(202) 223-1491

June 10, 1970

Re: 8330-F1A
C1-1178

The Honorable Dean Burch
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Chairman:

Business Executives Move for Vietnam Peace ("BEM") requests that the Commission rule immediately on its Complaint against radio station WTOP. The Complaint was filed on January 22, 1970, and has been pending before the Commission for several months, despite requests by Complainant for expedited treatment.

Time is of the essence in this Complaint seeking access to the air for presentation of editorial advertisements. In view of the currency of the issues involved, the lapse of even days, much less months, is critical. Unless the Commission acts rapidly on such complaints, First Amendment rights are negated and the Fairness Doctrine is em-

asculated. By its continued inaction, the Commission forecloses the legal and constitutional rights of the public to hear and of spokesmen like BEM to be heard.

Expeditious administrative processing is peculiarly important where First Amendment rights are at stake. See *Freedman* v. *Maryland*, 380 U.S. 51, 61 (1965). Complainants ought not to have to wait indefinitely for a ruling, See *Environmental Defense Fund, Inc.* v. *Hardin*, —— F.2d —— (D.C. Cir. May 28, 1970); *Kessler* v. *FCC*, 326 F.2d 673, 684 (D.C. Cir. 1963); *American Broadcasting Co.* v. *FCC*, 191 F.2d 492 (D.C. Cir. 1951).

The Commission currently has before it a Request for Declaratory Ruling by a political organization which also raises right of access questions. However, prompt ruling on BEM's Complaint, on which both parties have fully presented the relevant legal arguments, need not await disposition of other matters currently before the Commission. BEM's Complaint, dealing as it does with the right of the general public to reach the air, as opposed to a major association of politicians who have constant access to the air for their views, plainly raises fundamental public interest considerations.

BEM respectfully requests prompt resolution of its Complaint by the Commission.

Respectfully submitted,

THOMAS R. ASHER

MICHAEL SCHNEIDERMAN
1320 Nineteenth Street, N.W.
Washington, D.C. 20036
202-223-1491

ALBERT H. KRAMER
Citizens Communications Center
1816 Jefferson Place, N.W.
Washington, D.C. 20036

cc: The Honorable Robert T. Bartley
The Honorable Robert E. Lee
The Honorable Kenneth A. Cox
The Honorable Nicholas Johnson
The Honorable H. Rex Lee
The Honorable Robert Wells
William B. Ray, Esq.
Ernest W. Jennes, Esq.
Joseph A. Califano, Jr., Esq.

F.C.C. 70-860

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In Re Complaint by
BUSINESS EXECUTIVES MOVE FOR VIETNAM PEACE
Concerning Fairness Doctrine Re Station WTOP,
Washington, D.C.

August 5, 1970

BUSINESS EXECUTIVES MOVE FOR VIETNAM PEACE,
c/o Asher & Schneiderman,
1320 19th Street NW,
Washington, D.C.

GENTLEMEN: This is with reference to your complaint dated January 22, 1970, against the licensee of Standard Broadcast Station WTOP, Washington, D.C., and to statements subsequently submitted by you and the licensee.[1]

From information before us it appears that the complainant, Business Executives Move For Vietnam Peace Organization (hereinafter called BEM), a national organization of more than 2700 business owners and executives sought, in June 1969, to purchase time on WTOP for the purpose of broadcasting one-minute announcements urging immediate withdrawal of American forces

[1] Pleadings before the Commission include: Complaint filed by BEM on January 22, 1970; letter of response filed by Post-Newsweek Stations (WTOP) on February 5, 1970; letter of reply filed by BEM on February 16, 1970; letter requesting Commission action filed by BEM on February 24, 1970; letter filed by WTOP on February 24, 1970; letter filed by BEM on February 26, 1970, and response of WTOP filed February 27, 1970; letter filed by WTOP on February 27, 1970; letter filed by BEM on March 10, 1970; letter filed by WTOP on April 3, 1970; and letter filed by BEM on April 15, 1970.

from Vietnam and from other overseas military installations. While there is some indication that the complainant was informally given a favorable response, WTOP declined to sell time. BEM renewed its request in July, 1969 and again in January, 1970 with the same negative result. The licensee cited its long established policy of refusing to sell spot announcement time to individuals or groups to set forth views on controversial issues and stated that "subjects of this type require a more in-depth analysis than can be provided in a 10, 20, 30 or 60 second announcement."

Complainant's initial request to the station made no reference to the fairness doctrine and after being turned down in its attempts to purchase time, complainant made no further demands upon the licensee in terms of fairness doctrine, i.e. that the station in its coverage of the Vietnam issue present views similar to those expressed in BEM's statements. Complainant now alleges, however, that in refusing to sell or to provide free time for the announcements, the licensee has violated the fairness doctrine, infringed on the public's right to hear contrasting views such as those contained in BEM's announcements, and violated the First Amendment to the Constitution by suppressing free speech. Therefore, complainant contends, the Commission should order the licensee to present its announcements, either free of charge, or, in the alternative, at commercial rates. In response, the licensee denies complainant's charges and asserts that it has complied fully with all relevant statutes and Commission rules and policies. We shall deal first with the fairness aspect of the complaint. Normally, fairness complaints arise as a result of unsuccessful negotiations between the complainant and the station licensee. The Commission has developed procedures for the filing of a complaint under the fairness doctrine in the following manner:

> . . . The Commission expects a complainant to submit specific information indicating (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station had afforded, or has plans to afford, an opportunity for the presentation of contrasting viewpoints.[5] [2]

[5] The complainant can usually obtain this information by communicating with the station.

In short, by the time a complaint under the fairness doctrine reaches the Commission, the parties (both the complainant and the station) will have had an opportunity to fully crystallize their positions and delineate their areas of agreement and disagreement.

In the case before us, BEM initially made a request to purchase air time for the presentation of a number of spot announcements dealing with United States presence in Vietnam. The same request was made on at least three occasions with the variation that if WTOP would not sell time for this purpose, that it should provide it free of charge. The pleadings before us do not indicate that at any time BEM sought station coverage of views similar to those urged in its spot announcements by WTOP in its program coverage of the Vietnam War.

Consequently, while we will consider the complaint of BEM in its entirety, we believe the issue would have been immeasurably sharpened if the procedures set forth above had been observed.

[2] *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29, Fed. Reg. 10415, 10416.

BEM states that the Vietnamese war is unquestionably a controversial issue of public importance; that although WTOP has regularly presented the views of government officials and others supporting the Administration's position, it has not devoted a significant amount of time to contrasting views; that the war has provoked a wide diversity of responsible views, rather than merely views on "two sides;" that BEM advocates views in contrast to those already broadcast;[3] and that only by permitting BEM to air its views can WTOP comply with the legislative policy that it "afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[4]

In response, the licensee states that it has tried to provide balanced coverage of the Vietnam war issue in news reports, news interviews, commentary and statements by both supporters and opponents of the Administration policy. It cites extensive coverage of Moratorium activities last fall, including press conferences, meetings and rallies of numerous anti-war groups, and its handling of the President's speech of November 3, 1969, following which it presented five leaders generally supporting the President's position and six leading critics of his policy.

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[3] A review of BEM's announcements reveals that the following views are expressed: (1) that the bloodshed which may result from United States withdrawal from Vietnam does not compare with the bloodshed presently going on in Vietnam; (2) that the United States should not remain in Vietnam, because the war is morally corrupt, politically inept, and militarily stupid; (3) that the war is destroying the United States internally; (4) that the South Vietnamese government does not represent the people; (5) that "Vietnamization" of the war will prolong the war; (6) that the United States should try to save lives by withdrawing and not try to "save face;" (7) that the war is a "national disgrace;" (8) that our withdrawal must be total; (9) that remaining in Vietnam is based on a pseudo-patriotic principle; and (10) that the United States needs to overhaul its entire foreign policy.

[4] 47. U.S.C. § 315.

It states that it has broadcast the diverse views of its own commentators (Carl Rowan, Drew Pearson, Rod MacLeish and James J. Kilpatrick) and also carries the CBS programs, "Face the Nation" and "Capitol Cloakroom," which it states have provided opportunity for national leaders to present views both for and against the President's policy. WTOP alleges that BEM's complaint lacks the specificity which the Commision requires to establish unfairness, and states that "A complete quantitative evaluation of the coverage of any station, let alone an all-news and information station [WTOP], of as long-continuing an issue as the Vietnam War and President Nixon's policy with respect to that war would be virtually impossible as a practical matter." However, it states that a spot check of the three-month period, April-June 1969, reveals that its news reports and other programs included the views of a variety of Administration critics on the war on numerous occasions. The licensee has submitted an affidavit by the Executive Editor of WTOP Radio, stating that "of my own knowledge . . . each of the viewpoints embodied in the BEM announcements has been expressed on a number of occasions in various types of broadcast over WTOP . . . ."

The fairness doctrine requires a station which presents one side of a controversial issue of public importance to afford reasonable opportunity for the presentation of significant contrasting viewpoints on the issue in its overall programming, which may include news programs, interviews, discussion, debates, speeches and the like. No particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure, rather than the right of any individual or group to present personal views. As we stated in our *Report In the Matter of Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949):

> In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person (or group) making the request.

In the present case, because of the multiplicity of spokesmen available to express views on the Vietnam war, it is obvious that a licensee must exercise its judgment in choosing appropriate spokesmen to insure an orderly and effective presentation of the many conflicting views. The question, then, is whether a licensee has exercised reasonable, good faith judgment in applying the fairness doctrine to a particular issue or issues.

In the letter to *Mrs. Madalyn Murray*, 40 FCC, 647, 5 RR 2d 268 (1965), we stated:

> A licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation . . . as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all other facets of such programming. In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith.

On the basis of BEM's complaint and the licensee's response, we are unable to find that the licensee acted other than reasonably and in good faith in refusing to make time available for the broadcast of BEM's announcements. On the one hand, we have the licensee's

assertion that it has presented a wide variety of views on the Vietnamese war, including those embodied in the proposed announcements. The licensee has cited a number of specific instances in which it has presented views opposed to further American participation in the conflict. On the other hand, we have no more than a general allegation that WTOP has failed to present significant contrasting views on the subjects covered in the announcements. As we stated with regard to similar vague allegations in our letter of November 25, 1969, to *Allen C. Phelps and the Federation of Citizens Associations of the District of Columbia*, 21 FCC 2d 12, where it was charged that this same licensee had presented only the "liberal" viewpoint on a number of issues such as racial discrimination:[5]

> Absent detailed and specific evidence of failure to comply with the requirements of the fairness doctrine, it would be unreasonable to require licensees specifically to disprove allegations such as those made here. The Commission's policy of encouraging robust, wide-open debate on issues of public importance would in practice be defeated if, on the basis of vague and general charges of unfairness, we should impose upon licensees the burden of proving the contrary by producing recordings or transcripts of all news programs, editorials, commentaries and discussion of public issues, many of which are treated over long periods of time. Accordingly, although the Commission intends also to employ other appropriate procedures to insure compliance by licensees with the fairness doctrine (e.g., in-depth spot checks

[5] The *Phelps* complaint charged that WTOP's violation of the fairness doctrine was manifest by one-sided coverage of issues such as "liberal v. conservative" political philosophy, coverage of the Nixon administration, hostility toward the South, problems of the District of Columbia including crime, race relations, law and order and the station's attitude toward mass demonstrations.

at renewal time), it has long been our policy normally to require that fairness doctrine complaints (a) specify the particular broadcasts in which the controversial issue was presented, (b) state the position advocated in such broadcasts, and (c) set forth reasonable grounds for concluding that the licensee in his overall programming has not attempted to present opposing views on the issue. See *Applicability of Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415 (1964).

In short, where, as here, the complainant has made only a general allegation and the licensee has answered by affidavit that it has presented such viewpoints on numerous occasions, pointing also to example coverage of the Vietnam war, it is not unreasonable that the burden be placed on the complainant to come forward with some indication why a more detailed showing should be required—why it is he believes that the licensee has been unfair. Here the complainant has wholly failed to do so. We stress that we are not requiring complainants in this area to prove their case ahead of time. To place any undue burdens on such complainants would be inconsistent with the public interest since the Commission does depend for purposes of enforcement to a large extent on complaints in this area. However, the complainant must have some basis for his complaint that a licensee has been unfair and that basis can and should be set forth (e.g., several days monitoring of news or public affairs programming, with the assertion that only one viewpoint is presented). For, just as an undue burden should not be placed upon complainants, so also it is inappropriate to place such a burden on the licensee. A complainant cannot simply say the word, "Vietnam", "racial discrimination", "pollution", and require a licensee to devote extensive man-hours to cull over his past pro-

gramming to show fairness on general issues of this nature. This would be particularly burdensome to smaller stations, and would not be a policy promoting "robust, wide-open debate". Cf. *The New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). In sum, as a public trustee, the licensee must shoulder certain burdens, including upon an appropriate complaint the burden of showing that he has complied with the fairness doctrine, but based on our experience we find that the public interest also requires some reasonable specificity in a complaint to trigger this detailed showing by the licensee. There is no such specificity in this case, just as there was none in the *Phelps* case.

Before passing to the next particular of the complaint, we take cognizance of BEM's contention that licensee's policy of refusal to sell time for the broadcast of spot announcements dealing with controversial issues violates the fairness doctrine and amounts to "picking and choosing among topics so as to give exposure only to those which it prefers." It states that WTOP does broadcast announcements "on such controversial subjects of public importance as religion, the environment, the national economy, armed forces recruiting and smoking," and that it presents brief editorials taking positions on controversial issues. WTOP replies that it does not believe that the public service announcements it carries involve controversial issues of public importance; that it does not broadcast cigarette advertising, and that it believes that the anti-smoking announcements which it carries are in the interest of public health and welfare, comparable to consumer reports "to help protect the public from fraudulent or deceptive business practices." It states that its editorials are two minutes in length and "provide enough time for development of position," whereas, it asserts, "The actual substantive portion of the BEM spots [ranges] from about 20 seconds to 35 seconds . . .".

We find no reason to reverse our prior ruling in *Women's Strike for Peace* that the WTOP policy in question does not *per se* violate the fairness doctrine or any other Commission policy.[6] Citing Section 3(h) of the Communications Act of 1934, as amended,[7] we pointed out in that ruling that a broadcasting station is not a common carrier under the Act and therefore is not required to open its doors to all persons seeking to use the station's facilities for whatever purpose. As we stated in our letter to *Mrs. Madalyn Murray*, *supra*, it is within the licensee's judgment to determine the format for presentation of controversial issues "and all other facets of such programming." The licensee here as asserted, without rebuttal other than the unsupported assertions of complainant, that it has presented contrasting views, including the viewpoints embodied in complainant's announcements on the recited issues, and we find no reason to require that it present in addition the views of any particular group or in any particular format. We need not develop this point further, in view of the extensive treatment given the legal and policy consideration in the DNC ruling, Part I, issued this day, FCC 70-——. We rely here on those considerations.

In the second part of its complaint, BEM asserts that WTOP has frustrated the public's right to hear the views of BEM and thus has denied "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . . ."—citing *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission*, 395 U.S. 367, 390 (1969). However, as we noted above, the licensee has furnished or tendered evi-

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[6] Letter to *Washington Women's Strike for Peace*, November 22, 1965.

[7] Section 3(h) of the Act provides, in pertinent part, that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

dence that it has provided suitable access to the public on the ideas which BEM wishes to express, and it is clear that in this passage the Supreme Court was stressing the essential nature of the fairness doctrine, rather than the right of a particular spokesman to obtain access to the air, except in cases of personal attack and editorials endorsing or opposing political candidates. The Court stated:

> To condition the granting or renewal of licenses on a willingness to present *representative* community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgement of freedom of speech and freedom of press. *Id.* at 394 (emphasis added).

And in distinguishing between the general fairness obligation and the special obligations imposed in the case of a personal attack or a candidate endorsement, the Court noted that,

> These obligations differ from the general fairness requirement that issues be presented and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attacked party's side himself or choosing a third party to present that side. *Id.* at 378.

Inasmuch as WTOP appears to have presented "representative community views" on the issues here in question, we find that it has not acted contrary to the principles laid down in *Red Lion.* See discussion in *DNC* ruling, *supra.*

Finally, BEM argues that the Commission would be violating the First Amendment rights of BEM's spokesmen by sanctioning the licensee's policy of refusing to sell BEM time. Complainant relies principally upon the *Red Lion* decision. We do not believe that the Court's

decision supports complainant's conclusion. As noted above, the Communications Act specifically provides that a broadcaster shall not be deemed a common carrier, and thus he may exercise his judgment as to the particular program matter he will present. The licensee is thus constantly called upon to make choices between types and formats of programming and the persons to participate therein. If the licensee were required to present any matter brought to him which was not obscene, etc., the result would be not only chaotic but a wholly different broadcasting system which Congress has not chosen to adopt. *DNC* ruling, *supra.*

Based on the foregoing, we cannot find that the licensee of WTOP acted unreasonably or in bad faith with respect to the fairness doctrine, nor do we believe that its conduct was inconsistent with the principles laid down by the Supreme Court in *Red Lion* or infringed the First Amendment rights of BEM's spokesmen. Accordingly, the complainant's request for relief is denied.

Commissioner Bartley concurring in the result; Commissioner Cox concurring and issuing a statement; Commissioner Johnson dissenting and issuing a statement.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER KENNETH A. COX

I concur in this action because BEM has not made an adequate showing that its members' views have not been reasonably reflected in matter broadcast by WTOP. It is implicit in this ruling, of course, that if the station had not devoted reasonable time to the issues involved in the Vietnam War—including the positions espoused by BEM —it could have been required to do so. But that marks the

extent of its obligation to the public in this regard. To require more would pose serious problems for the continued health of our broadcast system and would clearly discourage the full and effective practice of broadcast journalism. The fact that BEM is willing, if need be, to pay for time to broadcast its views does not alter this. In the first place, if stations were required to carry all spots dealing with controversial issues for which time was ordered, this might occupy much of the time which can be devoted to nonprogram matter and could, in time, impair the effectiveness of the broadcast media for advertising purposes. Furthermore, although BEM is willing to pay, our ruling in *Letter to Cullman Broadcasting Co., Inc.*, FCC 63-849, would subject any station carrying its messages to the risk that those holding contrary views might claim free time for reply. I fully support the *Cullman* doctrine in those cases where broadcasters elect to accept sponsored controversial issue programming or paid spots, but think that to *require* them to accept such matter would unreasonably expose them to erosion of their advertising revenues. I have made it clear that I do not think broadcasters should escalate commercial time or seek to maximize their profits, but our system depends upon profitable commercial operation and I am not prepared to try to change that fundamental fact.

I do not think our ruling should be understood as holding that it would have been contrary to the public interest for WTOP to carry BEM's announcements, as other stations apparently did. While the brevity of the messages makes it impossible for them to develop ideas to any significant degree, I do not think we are in a position to rule that those who oppose the war in Vietnam should be completely barred from using this technique for getting their viewpoints across to the public. But I think their right of access to time on a station which has already adequately treated the war issues and has already re-

flected a particular claimant's position must depend on that station's willingness to accept such spots, with full understanding of its resulting obligations under the Fairness Doctrine, including the *Cullman* ruling.

Dissenting Opinion of Commissioner Nicholas Johnson

> The peculiar evil of silencing the expression of opinion is that it is robbing the human race; posterity as well as the existing generation; [and] those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error . . .
>
> —J. S. Mill, *On Liberty*, quoted in *Buckley* v. *Meng*, 230 N.Y.S. 2d 924, 932 (Sup. Ct. 1962).

History will record, I believe, the fundamental misstep taken today by the Commission in its slow progress toward securing truly free speech for all citizens over the broadcast media. Almost two hundred years ago, the architects of our country drafted a constitutional scheme of government based on the bedrock of one paramount principle: that a free society would endure only so long as its citizens had the freedom to think, to speak openly, and to criticize their government. This First Amendment freedom of speech and press was "preferred" above all others, see *Marsh* v. *Alabama*, 326 U.S. 501, 506 (1946), *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945), for all other liberties could be defended only so long as speech remained free. But should free speech vanish, then the

informed electorate necessary to preserve other freedoms would cease to exist.

Yet freedom of speech does not exist as an abstraction. The First Amendment protects not just the right to speak, but the right to reach an audience—the right to *communicate*. Protection of the means used to disseminate ideas, therefore, as well as the availability of forums used for discussion and debate, must receive as much attention as the more abstract right to speech itself:

> The right of free speech necessarily embodies the *means* used for its dissemination because the right is worthless in the absence of a meaningful method of its expression. To take the position that the right of free speech consists merely of the right to be free from censorship of the content rather than any protection of the means used, would, if carried to its logical conclusion, eliminate the right entirely. The right to speak freely must encompass inherently the right to communicate. The right to speak one's views aloud, restricted by the ban that prevented anyone from listening, would frame a hollow right. Rather, *freedom of speech entails communication; it contemplates effective communication.*

Wollam v. *City of Palm Springs*, 379 P. 2d 481, 486 (Cal. 1963) (emphasis supplied).

The Supreme Court has often recognized this principle, holding that forums for the expression of views must remain free and open, and that the preservation of these forums for the communication of views between citizens is one of our most important goals. In *Hague* v. *CIO*, 307 U.S. 496 (1939), Mr. Justice Roberts made the statement that *Kunz* v. *New York*, 340 U.S. 290, 293 (1951), later elevated to precedent.

> Wherever the title of street and parks may rest, they have immemorially been held in trust for the use

> of the public, and time out of mind have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague v. *CIO*, *supra* at 515. The Supreme Court has recognized this right of access to a "public forum" of communication in numerous other areas, including privately owned sidewalks, *Marsh* v. *Alabama*, 326 U.S. 501 (1946), modern shopping centers, *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), and public schools, *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503 (1969). And the Court has also acknowledged the importance of the press, see *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945), and the electronic media, see *Red Lion Broadcasting Co., Inc.*, v. *FCC* 395 U.S. 367 (1969), as forums or *means* for the communication of thought.

The question before this Commission, therefore, is the extent to which the First Amendment *requires* that the public forums of broadcasting be equated with the "streets and parks" of *Hague* v. *CIO*, and that the rights of citizens' access to those forums be included among the basic "privileges, immunities, rights and liberties of citizens." We must determine whether private corporate licensees of the FCC have any more right to exclude citizens from the use of their facilities, than a privately owned "company town," see *Marsh* v. *Alabama*, 326 U.S. 501 (1946), has a right to exclude citizens from its streets. The broadcast spectrum is public property belonging to the citizens of this country. It is entrusted for limited periods of time to the trusteeship of private entities, corporate broadcast licensees. I believe these corporate licensees must be

treated, for purposes of speech freedoms, as privately owned "company towns."

The issue, therefore, is not what policy the Commission might wish to adopt concerning the "advertisements" before us, but what the Constitution *requires* the Commission to adopt. "In seeking to provide the broadcasting media with the diversity *demanded* by the first amendment, . . . the Commission must avoid the perils of . . . abdication which would allow those possessing the most economic power to dictate what may be heard. . . ." *National Ass'n of Theatre Owners* v. *FCC*, 420 F.2d 194, 207 (D.C. Cir. 1969) (emphasis supplied). I believe the Commission has failed in this task.

The facts here are simply stated. Complainant, Business Executives Move for Vietnam Peace (BEM) is a well-established national organization with more than 2,700 members from business communities across the country. BEM has sought, unsuccessfully, for over a year, to purchase airtime on WTOP-AM in Washington, D.C., at its standard commercial rates, to present to residents of the nation's capital (including nationally elected members of the government) one-minute "spot announcements" urging immediate withdrawal of American troops from Vietnam and otherwise opposing the current Administration's war policy. WTOP-AM has denied BEM access to its broadcast facilities—which it freely offers to purveyors of mouthwash, underarm deodorant, and hand soap—on the ground that the station has a long-established policy of refusing to sell spot announcement time to individuals or groups with "controversial" views. WTOP-AM's principal justification for this policy is the belief—apparently not shared by BEM—that "subjects of this type require a more in-depth analysis than can be provided in a 10, 20 30, or 60 second announcement." The Commission has thrown the weight of its precedents and support behind

WTOP-AM's decision to bar the views proffered by BEM. Citing Section 3(h) of the 1934 Communications Act, the Commission argues that licensees are not "common carriers" and therefore WTOP-AM is "not required to open its doors to all persons seeking to use the station's facilities for whatever purpose." The majority thus delegates to "the licensee's judgment" the power to determine "the format for presentation of controversial issues 'and all other facets of such programming.'" Any other result, the Commission contends, "would be not only chaotic but a wholly different broadcasting system which Congress has not chosen to adopt."

The Commission's decision, I believe, ignores a long line of judicial precedent which guarantees to individuals a *right of access* to forums generally open to the public for expression of views. These cases, which I will discuss in detail below, establish the proposition that a private or public corporation, which exercises possession of, or control over, property which is open to the general public or to the communication of particular views, cannot discriminate between the persons or views that seek access to its facility, barring some and admitting others. BEM's request, therefore, places the following four issues before the Commission: *first*, are BEM's anti-war spot advertisements constitutionally protected "speech" under the First Amendment; *second*, is the action of WTOP-AM, a private corporation licensed and supervised by a public agency in a fiduciary or trustee capacity for public property, sufficient "state action" to bring the First Amendment's protections into operation; *third*, are BEM's proposed spot announcements an "appropriate" exercise of speech activities in the public forum of WTOP-AM's frequency, given the character, usual activity and purpose of the forum and the nature of competing uses; and *fourth*, is a limited right of non-commercial paid access" to WTOP-AM's frequency consistent with Section 3(h) of the Communi-

cations Act of 1934, which declares that broadcast licensees shall not be deemed "common carriers." I believe the Constitution compels an affirmative answer to all four questions. For the reasons stated below and in my dissenting opinion in Democratic National Committee, FCC 70-861, Aug. 5, 1970, I dissent to the majority's treatment of these issues.

I. ADVERTISEMENTS AS PROTECTED "SPEECH"

The Supreme Court has drawn a distinction between two types of speech: the first, political or social speech, is entitled to the fullest constitutional protection. Indeed, Professor Harry Kalven believes the "central meaning of the first amendment" is to preserve the citizen's right to criticize those who govern for him. Kalven, *The New York Times Case: A Note on 'The Central Meaning of the First Amendment,'* 1964 Sup. Ct. Rev. 191, 208-09; see Meiklejohn, *The First Amendment Is An Absolute*, 1961 Sup. Ct. Rev. 245, 256.

The second type of speech, "commercial" speech, however, has not been given much deference. "In the quarter century since *Valentine* v. *Chrestensen* [316 U.S. 52 (1942)], the notion that commercial advertising is not protected by the first amendment has been enshrined among the commonplaces of constitutional law." Note, *Developments in the Law: Deceptive Advertising*, 80 Harv. L. Rev. 1005, 1027 (1967); see, *e.g.*, *Ginzberg* v. *United States*, 383 U.S. 463, 474 n. 17 (1966); *Polak* v. *Public Util. Comm'n.*, 191 F.2d 450, 456-57 (D.C. Cir. 1951) (dictum), *reversed on other grounds*, 343 U.S. 451 (1952); see also, Note, *Freedom of Expression in a Commercial Context.* 78 Harv. L. Rev. 1191 (1965). In *Valentine* v. *Chrestensen, supra*, the Court upheld a municipal ban on the distribution of commercial pamphlets on city streets. The Court simply observed that "the Constitution

imposes no . . . restraint on government as respects purely commercial advertisinng." *Valentine* v. *Chrestensen*, 316 U.S. at 54.

Although the distinction drawn is an elusive one, it divides, perhaps, speech which seeks to influence political and social decisions in the marketplace of ideas from speech which seeks to influence private economic decisions in the marketplace of goods and services. Compare *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943) (conviction for door-to-door solicitation of contributions for religious literature reversed), and *Jamison* v. *Texas*, 318 U.S. 413 (1943) (advertisement on back of religious handbill protected), with *Breard* v. *Alexandria*, 341 U.S. 622 (1951) (conviction for door-to-door solicitation of magazine subscriptions upheld). And while this distinction has been severely criticized, see *Cammarano* v. *United States*, 358 U.S. 498, 513-15 (1959) (dictum) (Douglas, J., concurring), and I think with reason, it may indicate that the dissemination of "false" political ideas can evoke discussion or controversy which may refute or highlight the falsity of the original statement. "False" commercial assertions, by contrast, may only breed additional false claims from competitors with no corresponding improvements in the products sold. Note, 80 Harv. L. Rev. 1005, 1030 (1967). Viewed in this light, WTOP-AM and the Commission have relegated political and social speech to a peculiarly inferior role. By permitting broadcasters categorically to exclude political advertisements and accept only commercial announcements, the Commission has encouraged exclusion of highly valued political speech to the benefit of paid commercial speech.

With this in mind, it is clear that the paid anti-war advertisements proffered by BEM fall within the category of protected—indeed highly valued—political speech. The fact that BEM is willing to pay the "admission price" for

access to WTOP-AM's facilities does not detract from the purpose of its message to encourage political decisions in the marketplace of ideas. The Supreme Court in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), conclusively laid all doubts to rest on this point:

> The publication here was not a "commercial" advertisement in the sense in which the word was used in *Chrestensen.* It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. . . . That . . . the advertisement [was paid for] is as immaterial . . . as is the fact that newspapers and books are sold. [citations] . . . *Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.* [citations] . . . The effect would be to shackle the First Amendment in its attempt to secure "the widest possible dissemination of information from diverse and antagonistic sources." [citation] . . .
>
> . . . The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection.

New York Times Co. v. *Sullivan*, *supra*, *at* 266, 271 (emphasis supplied). "[W]hen an advertisement is the medium for noncommercial expression, constitutional freedoms apply in spite of its commercial nature." Note, *Resolving the Free Speech-Free Press Dichotomy: Access to the Press Through Advertising*, 22 U. Fla. L. Rev. 293, 309 (1969) (citing further authority at n. 131). *Accord*,

Banzhaf v. *FCC*, 405 F.2d 1082, 1101-02 (D.C. Cir. 1968); *Zucker* v. *Panitz*, 299 F. Supp. 102, 104 (S.D. N.Y. 1969); *Wirta* v. *Alameda-Contra Costa Transit Dist.*, 434 P.2d 982, 984-85 (Cal. 1967).

I conclude, therefore, that BEM's anti-war advertisements are "speech" deserving of First Amendment protection.

II. "STATE ACTION"

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." Although the language of this amendment binds only the national government, the Supreme Court has extended its protection to actions by the states as well. *Fiske* v. *Kansas*, 274 U.S. 380, 387 (1927); *Gitlow* v. *New York*, 268 U.S. 652, 666 (1925). "Yet, while the Fourteenth Amendment affords protection from state action as well as that from the national government, it does not protect against wrongs done by private persons." *Chicago Joint Bd., Amal. Cloth. Wkrs.* v. *Chicago Tribune Co.*, 307 F. Supp. 422, 425 (N.D. Ill. 1969). In order, therefore, to establish a violation of the First Amendment, there must be "state action"—here by the federal government—which deprives a group or individual of the speech freedoms guaranteed by the First Amendment.

On its face, the refusal by WTOP-AM to accept BEM's advertisements is "private action" by a private corporate licensee, and therefore not restrained by the Constitution. Yet the "state action" requirement has been found in the actions of many non-governmental persons or corporations. In each case, the private action has been sufficiently "involved" with the state that the restraints of the Constitution have been found to apply. The question before us, therefore, is whether WTOP-AM's actions are involved with the federal government to such an extent that the

Constitution sets limits to its action. To paraphrase *Farmer* v. *Moses*, 232 F. Supp. 154, 158 (S.D.N.Y. 1964) (grounds of World's Fair equivalent in status to public property), the question is whether WTOP-AM's actions "are so impregnated with and supported by state . . . action as to place them within the ambit of the [First] Amendment, . . . even though [WTOP-AM] . . . possesses certain indicia and aspects of 'private' ownership and dominion."

I believe that WTOP-AM's rejection of BEM's advertisements clearly constitute "state action" under a number of state action theories.

A. Public Property

The broadcast frequencies are a valuable and scarce resource belonging to the public. Although broadcast licensees are given the temporary use of this public property for terminable three-year periods, ownership and ultimate control remain vested in the people of the United States. In Section 301 of the 1934 Communications Act, Congress evidenced its clear intention that the broadcast spectrum should remain "public property:"

> It is the purpose of this Act . . . to maintain the control of the United States over all channels of interstate and foreign radio transmission; and to provide for the use of such channels *but not the ownership thereof*, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. [Emphasis supplied.]

The mere fact that the licensee's actions are taken with respect to public property should suffice to meet the test of required "state action." See *Tucker* v. *Texas*, 326 U.S. 501 (1946) (actions by municipal officials over property of government-owned town comprised "state action").

B. Private Lessee of Public Property

It is equally clear that the requirement of "state action" cannot be evaded by the *lease* of public property, by a public entity, to a private individual. Discrimination by private lessees with respect to public property, for purposes of the First Amendment, has unequivocally been deemed state action by the courts. *E.g.*, *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961) (state leased space in public building to privately owned restaurant); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967) (city "leased" public advertising space on city buses to "private" advertising agency); *Farmer* v. *Moses*, 232 F. Supp. 154, 159 (S.D. N.Y. 1964) ("when a city or state leases public property [such that] . . . services . . . are actually performed by a 'private' lessee, the latter stands in the shoes of the government"); *Anderson* v. *Moses*, 185 F. Supp. 727, 733 (S.D. N.Y. 1960) ("private . . . concessionair [operated] on public . . . property for the convenience and comfort of the public"); *Hillside Community Church, Inc.* v. *City of Tacoma*, 455 P.2d 350 (Wash. 1969) (action by private advertising agency, pursuant to "contract" with city, in removing advertisements from municipal buses comprised stated action); *Wirta* v. *Alameda-Contra Costa Transit Dist.*, 434 P.2d 982 (Cal. 1967) (publicly owned advertising space on municipal buses "leased" to private advertising company). In *Marsh* v. *Alabama*, 326 U.S. 501 (1946), a privately-owned "company town" was found to serve a "public function," and that its exclusion of a person seeking to distribute religious literature comprised "action" sufficient to bind it by the requirements of the First Amendment. If under certain circumstances the private owner of private property is bound by state action, then surely the private *user* of *public* property is no less bound. See, *e.g.*, *Tanner* v. *Lloyd Corp.*, 308 F. Supp.

128 (D. Ore. 1970) (privately owned shopping center); *Schwartz-Torrance Inv. Corp.* v. *Bakery & Con. Wkrs. U.*, 394 F. 2d 921 (Cal. 1964) (same).

In sum, therefore, "a broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. . . ." *Office of Communication of United Church of Christ* v. *FCC*, 359 F 2d 994, 1003 (D.C. Cir. 1966). Surely we could not assume that the federal government has leased public property to private individuals, yet attempted to free them from the obligations of the Constitution. First Amendment obligations are certainly among those imposed upon all broadcast licensees.

C. *"Delegation" of State Power*

When the state "delegates" its authority over public property to the use and control of a private entity, then the exercise of that use is state action for purposes of the Constitution.

> [W]here a state delegates an aspect of the elective process to private groups, they become subject to the same restraints as the State. [Citation.] . . . That is to say, when private individuals or groups are endowed by the State with powers of functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.

Evans v. *Newton*, 382 U.S. 296, 299 (1966) (although a state "delegated" its authority over public park to private trustees, discriminatory conduct of trustees comprised state action). WTOP-AM has exercised powers of control over its broadcast frequency which are governmental in nature—that is, the exclusion of persons wishing to express their views through a public facility of communica-

tion. See, *e.g.*, *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961) (discrimination by private restaurant lessee using and occupying publicly owned land and building "dedicated to 'public uses'" was state action); *Smith* v. *Allwright*, 321 U.S. 649 (1944) ("state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state"). Because, like any lessee, a broadcaster derives all his power through delegation from the federal government, private actions taken by the broadcaster-licensee-trustee with respect to his trust "res" are imbued with the attributes of state action. A licensee can only exercise the power he has, and the power he has flows from the government.

D. Involvement of Regulatory Agency

In *Public Utilities Comm'n.* v. *Pollak*, 343 U.S. 451 (1952), the Court addressed the question whether action by a privately owned public bus company, regulated by the Public Utilities Commission, was to be treated for purposes of the Constitution as action by a governmental entity. In finding sufficient state action, the Court specifically relied upon the fact that the bus company "operate[d] its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress." *Id.* at 462. The Court cited as authority the following proposition from *American Communications Assn.* v. *Douds*, 339 U.S. 382, 401 (1950): "[W]hen authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself." There is little doubt that both the Congress and this Commission are substantially involved in the operations of broadcast licensees. Again, this involvement should provide the

requisite state action. Indeed the *Commission itself* has expressly acknowledged that discrimination by licensees may constitute improper state action:

> [A] substantial case has been made that because of the relationship of the government of the United States to broadcast stations, the Commission has a constitutional duty to assure equal employment opportunity. . . . The contention is rested upon such decisions as *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961).

Nondiscrimination Employment Practices of Broadcast Licensees, 18 F.C.C. 2d 240, 241 & n.2 (1969).

E. State Encouragement or Lack of Neutrality

In *Evans* v. *Newton*, 382 U.S. 296 (1966), a state court permitted a municipality to transfer its control over a public park to private trustees who denied Negroes access to the facility. The Supreme Court barred the discrimination. In a concurring opinion, Justice White pointed out that a provision of state law permitted private trust settlors to dedicate their property to the public for use as a park and limit the use of that park "to the white race only." Although this statute did not *compel* a settlor to discriminate, it certainly indicated that such an action would be *valid*. According to Justice White, this statute "depart[ed] from a policy of strict neutrality in matters of private discrimination by enlisting the State's assistance only in aid of racial discrimination and . . . involve[d] the State in the private choice. . . ." *Id.* at 306. By encouraging discrimination, although not requiring it, the state sufficiently intertwined itself with private discriminations to constitute state action. See also *Reitman* v. *Mulkey*, 387 U.S. 369 (1967).

There are close parallels with WTOP-AM's censorship of BEM. Section 3(h) of the Communications Act provides that licensees shall not be deemed a "common car-

rier," and the Commission, reversing prior precedent, see *e.g., United Broadcasting Co.* (*WHKC*), 10 F.C.C. 515 (1945), has interpreted this to give licensees the discretion to close their doors to persons seeking to use the station's facilities. See *Letter to Washington Women's Strike for Peace*, Nov. 22, 1965 (cited by the majority in the instant case). I believe that the Commission's interpretations and enforcement of the Communications Act, together with its improperly intentioned reversal of prior Commission doctrine, see *Reitman* v. *Mulkey*, *supra*, provides similar "encouragement" for discrimination by private licensees of the sort involved here. *Cf. Adickes* v. *S. H. Kress & Co.*, 38 U.S.L.W. 4434, 4444 (Sup. Ct., June 2, 1970) (Brennan, J, concurring in part); *Lombard* v. *Louisiana*, 373 U.S. 267 (1963) (statements by Mayor and Superintendent of Police encouraging private discrimination found to be state action). This encouragement should suffice for state action. We need not address the question whether Section 3(h) of the Act itself "encourages" licensee discrimination sufficient for state action.

F. State Action Through Quasi-Judicial FCC Action

In *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), the Court announced that "action of state courts and judicial officers in their official capacities is to be regarded as action of the State. . . ." *Id.* at 14. Although the Court also suggested that state action might not be found where a State through its court merely "abstained from action, leaving private individuals free to impose such discriminations as they see fit" *Shelley* v. *Kraemer*, 334 U.S. at 19, this distinction between court "action" and "inaction" has apparently been weakened by later rulings. Thus, in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), the Court remarked, in finding the First Amend-

ment to protect the New York Times against a civil suit by a *private* party, that "[i]t matters not that the law has been applied in a civil action and that it is common law only. . . . The test is not the form in which state power has been applied but, *whatever the form*, whether such power has in fact been exercised." *Id.* at 265 (emphasis supplied). For a discussion of the state action implications of *New York Times Co.* v. *Sullivan*, see Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 Duke L. Rev. 219, 227-30.

In a recent opinion, *Edwards* v. *Habib*, 397 F. 2d 687 (1968), Judge Wright, speaking for the Court, discussed in detail current interpretation of *Shelley* v. *Kraemer*. After a review of the precedents and other prevailing views, he summarized them thus:

> It has been suggested that there is state action, not only when an individual asserts a claim of right against a state, but also when he asserts a claim of right against the claims of right of other persons and the state resolves the conflict according to its policy of what is reasonable under the circumstances, *i.e.*, according to its law. [Footnote omitted.] Once this "state action" is established, the question then becomes simply "whether the particular state action in the particular circumstances, determining legal relations between private persons, is constitutional when tested against the various federal constitutional restrictions on state action." [Citing Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 So. Cal. L. Rev. 208, 209 (1957)].
>
> . . . On this theory, if it would be unreasonable to prefer [a particular private person's] . . . interests, it would also be unconstitutional.

Edwards v. *Habib*, *supra* at 695. For commentators discussing this view, see Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, *supra*, at 241-45; Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing*, 52 Calif. L. Rev. 1 (1964); Williams, *The Twilight of State Action*, 41 Texas L. Rev. 347 (1963); Van Alstyne and Karst, *State Action*, 14 Stan. L. Rev. 3 (1961); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, *supra*.

Marsh v. *Alabama*, 326 U.S. 501, 509 (1946), apparently provides support for this view. There, the Court "balance[d] the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion" and stressed that the latter freedoms occupied "a preferred position." See also *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), and *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), in which state courts were used merely as forums for the resolution of essentially private disputes. In all these cases speech freedoms were involved, and in each case the Court "balanced" the rights to speech under the First Amendment against the rights to the enjoyment of property under the Fifth Amendment.

Rather than forcibly entering the premises controlled by WTOP-AM to broadcast their message through attempted "self-help," BEM has come to this Commission to seek a legal adjudication of its rights. After an investigation of the factual allegations and due consideration of BEM's legal arguments, *cf. Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451, 462 (1952), the Commission has effectively "ejected" BEM from WTOP-AM's facilities. Compare *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308

(1968) (state trespass laws used to eject picketers from private property). By adjudicating the rights and liabilities of the parties to this matter, and therefore binding the parties to a certain course of action, this Commission has invoked the "full panoply of its power," *Shelley* v. *Kraemer*, 334 U.S. at 19, to banish BEM to silence. This, I believe, should provide sufficient state action to invoke the restraints of the Constitution. This is particularly so when the broadcast licensee is not a purely private entity at all, but is licensed by the federal government and performs a "public function" similar to that performed by the government toward public parks and streets. See *Marsh* v. *Alabama*, 326 U.S. 501, 507 (1946).

G. State "Acquiescence"

In all the cases discussed in the previous sections, the courts have sought to establish at least some formal connection between private and public action. But in a number of important cases, the immediate "action" necessary to invoke the First Amendment was not direct, affirmative involvement by the government in private conduct, but state "acquiescence" in a certain type of private actions. In all these cases, however, the state had either relinquished its power to private entities (through assignments of control, or leases), or simply abdicated its power role (by failing to impose requirements, for example, on corporate entities under its licensing control). Accordingly, where the power exercised by the private individual is normally or even potentially exercisable by the state, but where the state has relinquished or abdicated that power, then private actions pursuant to that power comprise state action—that is, the "permission" of private discrimination which the state has the power to prevent. In the First Amend-

ment area, therefore, it seems that the refusal by the state to enforce freedom of speech in forums under the potential control of the government may provide sufficient "state action" to restrict the speech abridgement activities of private individuals.

In *Marsh* v. *Alabama*, 326 U.S. 501 (1946), for example, the Court found that a private company town's discrimination involved state *in*action sufficient to invoke the Constitution:

> [*M*]*ere acquiescence* by the State in the corporation's use of its property . . . would still have been performance of a public function and discrimination would certainly have been illegal . . . . And certainly the corporation can no more deprive people of freedom of press and religion than it can discriminate against Commerce . . . . [T]he circumstance that the property rights to the premises where the deprivation of liberty . . . took place, were held by others than the public, is not sufficient to justify the State's *permitting* a corporation to govern a community of citizens so as to restrict their fundamental liberties . . . .

Id. at 507 & n. 4, 509 (emphasis supplied). Presumably because the corporation was licensed by the state, and because the corporation performed a "public function" similar to that of any municipality, state abdication of authority comprised state action. To be sure, there was technical "state action" present in *Marsh*, in that the state was asked to enforce its trespass laws against an individual invading private property. But this element could not have been controlling. If, for example, the company had sent its corporate officers out to the town's border to prevent Marsh from setting foot on corporation property, and if Marsh instead had asked for a court injunction to restrain the officers' actions and permit his entry to the corporation's land, the result could have

been no different. Compare *Tanner* v. *Lloyd Corp.*, 308 F. Supp. 128, 130 (D. Ore. 1970) (action to compel entry to shopping center).

In *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), the Court found that discrimination by a privately owned restaurant that had leased its facilities from the state comprised state action. Again, the Court stressed the element of *in*action as supplying a necessary link between private conduct and the Constitution:

> [I]n its lease with [the restaurant] the [State Parking] Authority *could* have affirmatively required [the restaurant] . . . to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively *abdicate* its responsibilities by either *ignoring* them or by merely *failing to discharge* them whatever the motive may be. . . . By its *inaction*, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.

Id. at 725 (emphasis supplied). Other cases are in accord. See, *e.g.*, *Evans* v. *Newton*, 382 U.S. 296 (1966); *Terry* v. *Adams*, 345 U.S. 461 (1953); *Smith* v. *Allwright*, 321 U.S. 649 (1944).

There is, in the case before us, a clear and direct analogy. The government has "delegated" to WTOP-AM the use of valuable public property. Although Congress has exercised its power to prevent licensee censorship in other areas, stating in Section 315(a) that the "licensee shall have no power of censorship over the material broadcast under the provisions of this section," and although the exercise of this power to prevent private censorship seems clearly permissible under the Constitution, *cf.* *United States* v. *Price*, 383 U.S. 787 (1966); *United*

States v. *Guest*, 383 U.S. 745 (1966); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), Congress apparently has not barred various forms of licensee censorship by specific legislation. By failing clearly to prohibit licensee censorship, Congress and the Commission have thus "permitted" a form of private censorship which appears inconsistent with the First Amendment.

H. State "Enforcement" of the First Amendment

The division between state and private action is by no means distinct, for the decision to inject the restraints of the Constitution into ostensibly private actions is fundamentally one of policy. A number of commentators, therefore, at least in the Fourteenth Amendment area of racial discrimination, have argued that where important or "preferred" rights are involved, the state cannot tolerate private discrimination or abridgement of those rights. Otherwise, the purposes of the Fourteenth Amendment would be thwarted. Accordingly, they have suggested that the state implicates itself in private action when it *fails affirmatively to enact* legislation barring private discrimination. See, *e.g.*, Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69, 73-74 (1967); Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 Colum. L. Rev. 855 (1966); Henkin, *Shelley* v. *Kraemer, Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473, 481-85 (1962). Thus, according to this view, there is unconstitutional state action whenever the state fails to eliminate private discrimination. According to this theory, the technical requirements of "state action" may be found, via *Shelley* v. *Kraemer*, in any court action. The only relevant question is where to draw the line between permissible and impermissible state action—since the limitless scope of *Shelley* would apply state action to all judicial cases. Ac-

cording to proponents of this view, the state has the obligation to legislate against private discrimination until that legislation begins to abridge other important, counterveiling individual rights, such as liberty, property, and privacy. See, *e.g.*, Black, *supra*, at 100-103. What this means, therefore, is that a state court could still enforce certain kinds of private discrimination, even though the state itself could not discriminate in such a manner. "The state court, for instance, could constitutionally probate a will leaving the deceased's property to the Catholic Church, even though the state could not constitutionally make a comparable disposition of its own funds." *Edwards* v. *Habib*, 397 F.2d 687, 692 n. 13 (D.C. Cir. 1968) (dictum). "The state, through its police or courts, could aid an individual in his quest to keep Negroes from a dinner party in his home even though it could not keep Negroes from a courthouse cafeteria or even from a privately owned hotel solely on account of their race." *Edwards* v. *Habib*, *supra*, at 693 (dictum). The point here is that in either case state action would exist; however, that action would be constitutional, or unconstitutional, depending on a balance of various important rights: liberty, property and privacy, balanced against freedom from racial discrimination.

As yet, this theory has not been frequently applied to discriminatory state action under the First Amendment. This may in part be historical accident, but it may also result from differences in the language of the First and Fourteenth Amendments. On the other hand, as the court in *Edwards* v. *Habib*, 397 F.2d 687, 693-94 (D.C. Cir. 1968), points out, the Supreme Court in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265 (1964), has extended the protection of the First Amendment to the New York Times against action by a *private* individual for libel. The fact that neither Congress nor the State had made a law prohibiting libel was apparently deemed

irrelevant. The Supreme Court, therefore, has found sufficient "state action" simply in a state court adjudication of the rights of two private parties.

The California Supreme Court has apparently adopted this position explicitly. *In re Hoffman*, 434 P.2d 353 (Cal. 1967), involved a trespass conviction of persons seeking to distribute anti-war leaflets on the property of a privately-owned railroad terminal. Citing *New York Times Co.* v. *Sullivan* and *Marsh* v. *Alabama*, the Court apparently felt that state action was inherent in its own decision, no matter what the result, whenever it was required to resolve the competing claims of private individuals:

> If the state curtails First Amendment freedoms to protect an interest that is nonexistent, whether claimed on behalf of the government or on behalf of a private individual, it violates the First and Fourteenth Amendments.

The "curtailment" of First Amendment freedoms by the state could only have been a reference to sanctions imposed *by the court* on the persons distributing the leaflets. State action, in other words, was assumed to exist in the court's decision alone. The only critical question was striking an appropriately weighted balance between speech and other freedoms. This balancing process was simplified for the court in *Hoffman* because the rights of privacy and liberty that normally inhere in property ownership were apparently "nonexistent." Once the owners of the railway terminal had "opened up" their property to the general public, they had (for profit) obviously given up any "privacy" they might otherwise have had. Although the station owners might have reclaimed their privacy by closing the terminal to the public, they could not, at the same time, open it to the public for some purposes, but exclude others on the alleged need for privacy.

Many courts and legal scholars have pointed out the need for affirmative action by the government to protect the rights guaranteed by the First Amendment. In *Associated Press* v. *United States*, 326 U.S. 1 (1945), the Supreme Court wrote:

> It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom . . . . Surely a command that the government itself shall not impede the free flow of ideas does not afford non-government combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom . . . . Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

Id. at 20. And Justice Fortas has remarked, "The courts may not and must not permit either public or private action that censors the press." *Time, Inc.* v. *Hill*, 385 U.S. 374, 420 (1967) (dissenting, joined by Warren, C.J., and Clark, J.).

In *Firstamerica & Dev. Corp.* v. *Daytona Beach News-Journal Corp.*, 196 So.2d 97, 99 (Fla. 1966) the court observed:

> Freedom of the press was never intended to be a special privilege extended to its publishers. On the contrary, it was conceived by the writers of the Constitution and of the Bill of Rights to be a right of the people in a democracy to unrestricted information and presentation of views on government for which the press was a tailor-made medium of dissemination. Freedom of the press, therefore, is a people's personal right rather than a property right. . . .

Other courts have concurred. "Those [constitutional] guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society." *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967). "[F]reedom of the press is a right which belongs to the public; it is not the private preserve of those who possess the implements of publishing." *State* v. *Buchanan*, 436 P. 2d 729, 731 (Ore. 1968). "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367, 390 (1969).

There is, in fact, a strong argument that Congress, through the Communications Act of 1934, enforced the First Amendment in the area of broadcasting by applying its restraints to private licensees. According to this view, Congress intended licensees to operate in the public interest, convenience and necessity, and this necessarily entailed patterns of operation consistent with First Amendment prohibitions on censorship. Indeed, at one time the Commission itself apparently adopted this view. In *United Broadcasting Co. (WHKD)*, 10 F.C.C. 515 (1945), for example, the Commission said: "The spirit of the Communications Act of 1934 requires radio to be an instrument of free speech," and it warned against "any type of censorship which would undertake to impose the views of the licensee on the material to be broadcast." *Id.* at 517-18. If the Communications Act does apply the First Amendment to broadcasters, then the search for state action becomes unnecessary.

Yet what has happened to that free and open "marketplace of ideas" since the founding of our country? As R. H. S. Crossman has seen, a new political, economic and social revolution "has concentrated coercive power and thought control in a few hands." Power has shifted

from those who control the "means of production" to "those who control the media of mass communication and the means to destruction (propaganda and the armed forces)." R. H. S. Crossman, *The Politics of Socialism* 44 (1965). Another commentator has noted, "it is not that the mass communication industry is pushing certain ideas and rejecting others but rather that it is using the free speech and free press guarantees to avoid opinions instead of acting as a sounding board for their expression." Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1646 (1967). And V. O. Key has warned:

> [A]ttention to the economic aspects of the communications industries serves to emphasize the fact that they consist of commercial enterprises, not public service institutions. . . . They sell advertising in one form or another, and they bait it principally with entertainment. Only incidentally do they collect and disseminate political intelligence. . . . [N]ewspaper publishers are essentially people who sell white space on newsprint to advertises. . . .

V. O. Key, *Public Opinion and American Democracy* 378-79 (1961).

The growing concentration of power over the media of communication into private corporate hands will require new concepts of "state action" if freedom of speech is to be preserved. Private corporate censorship by radio and television licensees must become a thing of the past if dissent and diversity of views in this country is to flourish. See generally *Letter to Hon. Richard L. Ottinger* [*Judy Collins incident*], FCC Public Notice No. 47876, April 20, 1970 (dissenting opinion); Johnson, *Public Channels and Private Censors.* The Nation, March 23, 1970, p. 329. There is, therefore, a direct legal and social connection between the power of the mass media, whose owners stand

like a colossus astride the channels of communications, and the state action rquirement that the First Amendment's protection does not become operative until speech is abridged by a government-involved entity. *Marsh* v. *Alabama*, 326 U.S. 501 (1946), is perhaps the opening wedge. It holds that private corporations must not be unleashed to abridge personal freedoms at will. A. J. Berle, in commenting on *Marsh* v. *Alabama*, has stated this important principle with great perceptivity:

> The emerging principle appears to be that the corporation . . . is as subject to constitutional limitations which limit action as is the state itself. . . . The preconditions of application are two: the undeniable fact that the corporation was created by the state and the existence of sufficient economic power concentrated in this vehicle to invade the constitutional right of an individual to a material degree. This is new as a rule of law, but it is typically American in tradition. . . . The principle is logical because . . . the modern state has set up, and come to rely on, the corporate system to carry out functions for which in modern life by community demand the government is held ultimately responsible. It is unlimited because it follows corporate power whenever that power actually exists. . . . Instead of nationalizing the enterprise, this doctrine "constitutionalizes" the operation.

Berle, *Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power*, 100 U. P. L. Rev. 939, 942-43 (1952); see also, St. Antoine, *Color Blindness But Not Myopia: A New Look at State Action, Equal Protection and 'Private' Racial Discrimination*, 59 Mich. L. Rev. 993 (1961); Miller, *The Constitutional Law of the 'Security State,'* 10 Stan. L. Rev. 620, 661-66 (1958).

There are only a limited number of ways in which a person can obtain access to the mass media of communica-

tion: (i) buy a radio or television station; (ii) buy commercial space for promotion of goods and services; (iii) develop a situation worthy of news coverage (*e.g.*, demonstrations, street marches, etc.); (iv) obtain the sympathy of an editorial staff member who will present one's views by "proxy;" (v) obtain rebuttal time under the fairness, personal attack, or equal time doctrines; or (vi) purchase time for non-commercial speech. Yet in every case, access to the most important media of communication our century have seen is severely limited.

Thus, (i) the Commission has already taken steps to make access through ownership even more difficult than it already is. See *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants*, 35 Fed. Reg. 822 (1970); *Petitions by B.E.S.T.*, 21 F.C.C. 2d 355 (1970), *reconsideration denied*, FCC 70-738 (July 21, 1970). (ii) Commercial space for goods and services both excludes those with purely political or social speech, and abdicates the bulk of radio and television "access time" to monolithic commercial and corporate enterprises. (iii) Demonstrations and street marches soon fade in newsworthiness, and people wishing to reach the bulk of the American people must increasingly resort to the tactics of extremism to capture the largess of the television eye. (iv) The sympathy of a radio or television station's editorial staff is often difficult to obtain, and is perhaps nonexistent in those communities with few radio or television outlets. And (v), the Commission has been reluctant to apply the fairness doctrine evenhandedly to those with minority or dissenting views. See, *e.g.*, *Letter to Mr. Donald A. Jelinek*, FCC 70-595 (June 4, 1970) (anti-military recruitment announcements); *Letter to Mrs. Dorothy Healey*, FCC 70-658 (June 24, 1970) (attack on member of Communist Party for "unpatriotic" views).

Only (vi), therefore, the ability to purchase time at going commercial rates can offer many Americans any opportunity for electronic speech. Although the First Amendment was not enacted to sanctify the views held by the corporate owners of the mass media, government inattention and failure to "enforce" the First Amendment has had that effect. Accordingly, "non-commercial access" may be required under the First Amendment to preserve or create a true "marketplace of ideas" in the electronic media. Both commentators and courts have recognized this proposition. See *e.g.*, Silver, *Free Speech on Private Property*, 19 Cleveland State L. Rev. 372 (1970); Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 Geo. Wash. L. Rev. 487 (1969); Horning, *The First Amendment Right to a Public Forum*, 1969 Duke L. Rev. 931; Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1644-50 (1967); Gorlick, *Right to a Forum*, 71 Dick. L. Rev. 273 (1967); Note, *The Listener's Right to Hear in Broadcasting*, 22 Stan. L. Rev. 863 (1970); Note, *Resolving the Free Speech—Free Press Dichotomy: Access to the Press Through Advertising*, 22 U. Fla. L. Rev. 293, 304 (1969).

I conclude, therefore, from the foregoing discussion, that BEM's advertisements are constitutionally protected speech under the First Amendment, and that WTOP-AM's action in refusing that proffered speech is sufficiently involved with the state to invoke the restraints of the Constitution. I have engaged in this detailed treatment of "state action" for one principle reason: to lay conclusively to rest any argument that licensees have the freedom to censor at will, unrestrained by the First Amendment. They do not. Radio and television licensees, when they act vis-a-vis the people, must be treated, for purposes of the Constitution, as if they were agents of the government. Broad-

cast licensees have no more absolute right to impose bans on speech over their facilities than do groundskeepers in public parks. In all cases involving demands for "access" to the mass media, the only question is whether the broadcaster's restrictions and limitations are *reasonable.* A licensee may obviously impose reasonable "time, place and manner" restrictions upon the use of his facility; but he can no more absolutely ban certain kinds of speech or types of speakers than the government can ban citizens from public parks and streets. *Cf. Hague* v. *CIO,* 307 U.S. 296 (1939).

III. THE "APPROPRIATENESS" OF THE SPEECH IN THE PARTICULAR FORUM

Over the past few years, the courts have dealt with a number of cases in which persons wished to exercise speech freedoms in conjunction with public or private property—for example, public streets and parks, train stations, bus terminals, schools, and so forth. In most of these cases, the court has first established the existence of state action (or disposed of it as unimportant). Then, the court has asked two types of questions: first, is the property in issue an appropriate forum for the communication of views; and second, has the person owning or controlling that forum "discriminated" between individuals or particular views in a manner which is inconsistent with the Constitution. The answer to the first question normally depends on whether the property has "traditionally" been used as a forum for communication, as in *Hague* v. *CIO, supra,* or whether the property has been "opened up" to the general public in such a manner that speech on that property would be a normal activity. The answer to the second question has generally turned on whether the property owner's restrictions on speech are "reasonable," and this in turn depends on whether

the speech interferes with any important property right (such as privacy, exclusive possession, freedom from interference or obstruction, etc.) which is *worth preserving*. As stated in *In re Hoffman*, 434 P. 2d 353 (Cal. 1967), the courts will not curtail First Amendment freedoms "to protect an interest that is *nonexistent*. . . ." *Id.* at 356 (emphasis supplied).

The doctrines evolved by the courts are contained in the following proposition: When private property, which is an appropriate forum for communication, is "opened up" to general use by the public, then the "private" owner of that property "waives" his traditional property rights to privacy and exclusivity of use, and cannot abridge the speech rights of individuals seeking to use his "forum" for the expression of views. Under certain circumstances (although perhaps not in the broadcast area), the private owner may entirely close his property to the public; but if he opens it at all, he demonstrates that he has no real property interest of "privacy," and he cannot therefore close it selectively to specific persons or particular views.

A. Existence of a "Forum"

In *Marsh* v. *Alabama*, 326 U.S. 501 (1946), a person seeking to distribute religious literature on the streets of a privately owned "company town" was prosecuted for trespass at the instance of the company owners. The Court reversed, finding that the privately owned town in fact performed a "public function" similar to that of any town, whether private or publicly owned, and stated:

> Ownership does not mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . .

> . . . Whether a corporation or a municipality owns or possesses the town, the public in either case has an identical interest in the functioning of the community in such a manner as the channels of communication remain free.

Id. at 506, 507. Although the Court felt the private corporation could entirely "close the sidewalk" to the public, *Marsh* v. *Alabama*, *supra* at 505 n. 2, the corporation could not "discriminate" against certain religious views once it had generally opened the sidewalk up to the public. *Id.* at 507.

Many other cases have followed the doctrine of *Marsh* v. *Alabama*, holding that in certain circumstances private property "may, at least for First Amendment purposes, be treated as though it were publicly held." *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 316 (1968). See, *e.g.*, *Tanner* v. *Lloyd Corp.*, 308 F. Supp. 128 (D. Ore. 1970); *Hillside Community Church, Inc.* v. *City of Tacoma*, 455 P. 2d 350 (Wash. 1969); *In re Lane*, 457 P. 2d 561 (Cal. 1969); *In re Hoffman*, 434 P. 2d 353 (Cal. 1967); *Schwartz-Torrance Inv. Corp.* v. *Bakery & Con. Wkrs. U.*, 394 P. 2d 921 (Cal. 1964); *Amalgamated Cloth. Wkrs.* v. *Wonderland Shop. Ctr.*, 122 N.W. 785 (Mich. 1963) (affirmance by equally divided court). For other cases in which the court found the existence of a "public forum" for communication of views, see, *e.g.*, *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503 (1969) (public school); *Wolin* v. *Port of New York Authority*, 392 F. 2d 83 (2d Cir. 1968) (bus terminal); *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969) (public high school newspaper); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967) (public subway walls); *Wirta* v. *Alameda-Contra Costa Transit District*, 343 P. 2d 982 (Cal. 1967) (public busses);

Danskin v. *San Diego Unified School Dist.*, 171 P. 2d 885 (1946) (public school buildings); *People* v. *St. Clair*, 56 Misc. 2d 326, 288 N.Y.S. 2d 388 (Crim. Ct. 1968) (public subway platform).

In sum, these cases all stand for the proposition that where property, publicly or privately owned, is "opened up" for general use by the public, whether or not that use directly involves speech activities, then the facility cannot be closed to speech unless its exercise directly and substantially interferes with the facility's primary use—for example, as a shopping center, bus station, railway terminal, subway, or school.

In the case before us involving WTOP-AM's rejection of BEM's advertisements, there seems little question that the frequency controlled by WTOP-AM is a "forum" for the communication of ideas. Indeed, that appears to be its exclusive purpose, whether those ideas be political, commercial or entertainment. And there is also no question that WTOP-AM has "opened up" the use of that frequency to the general public—by making *commercial* advertising time available to the general public on a first-come, pay-as-you-go basis. See, *e.g.*, *Kissinger* v. *New York Transit Authority*, *supra*; *Zucker* v. *Panitz*, *supra*; *Hillside Community Church, Inc.* v. *City of Tacoma*, *supra*; and *Wirta* v. *Alameda-Contra Costa Transit District*, *supra*, all cases in which the owner of private or public property opened up his facility for the display of private commercial advertisements. In each case, the court found that a "public forum" for the communication of views was present. Whether or not WTOP-AM's opening of its forum for the communication of private commercial views constitutes an "opening up" for non-commercial (but also paid) views, will be considered below.

B. "Reasonable" Use of Forum

Every licensee must retain some power to reject programming—if only when it fails to meet certain quality standards, or violates federal law (lotteries, obscenity, etc.). But just as clearly the licensee, as a trustee for the public, does not possess unlimited power to monopolize the use of the airwaves. The essential question, therefore, is whether the use of advertising "space" or the broadcast spectrum by BEM is "reasonable" and consistent with other uses of that spectrum by the licensee.

The Commission and the courts must begin to draw guidelines for "reasonable" access to the broadcast frequencies, seeking to ensure that the electronic media of twentieth century communication are as open to the public as the soap boxes, public parks, and town hall meetings of the last century. *Cf.* Kalven, Jr., *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 Sup. Ct. Rev. 1, 21-32. On the one hand, "[t]he rights of free speech . . . do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." *Cox* v. *Louisiana*, 379 U.S. 536, 554 (1964) (Goldberg, J.). But on the other hand, "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment." *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367, 390 (1969).

The FCC and the courts have already begun to develop variants of the access doctrines latent in *Red Lion*. The fairness, personal attack, and equal time doctrines all curtail the licensee's discretion to reject programming. So does the requirement that the licensee ascertain community needs and interests and devote "some significant proportion of [its] . . . programming" to them. *City of*

Camden, 18 F.C.C. 2d 412, 421 (1969). In light of the "state action" discussion above there may well be limits on the ability of a licensee to censor out of a prepared program, during broadcast, the remarks of an invited guest. See *Letter to Cong. Richard L. Ottinger* [*Judy Collins incident*], FCC Public Notice No. 47876, April 20, 1970 (dissenting opinion). In the case here before us, BEM is willing to pay the "going commercial rate" to gain access to WTOP-AM's facilities. Therefore, unlike fairness doctrine cases, a requirement of access imposed on WTOP-AM with respect to this anti-war announcement *would impose no financial burden on the station.* This is an extremely important point. Compare *Letter to Mr. Donald A. Jelinek*, FCC 70-595, (June 4, 1970) (dissenting opinion at pp. 21-22) (free public service announcements would impose no financial burden on licensee). So long as the party seeking access to a broadcast facility is willing to pay the going rate, we need not face the equal protection question posed by persons financially unable to pay for their "privilege" of electronic speech.

The state and federal courts have, during the past few years, addressed precisely the same question before this Commission—although in the somewhat different context of *spacial* forums (parks, streets, train terminals, etc.), and not *electronic* forums. In every case involving persons who sought only to use the advertising facilities provided to commercial advertisers, the courts decisively ruled that the owner of the property in question could not admit commercial advertisements and exclude political ones.

The germinal case in this area was decided by the California Supreme Court in 1967. In *Wirta* v. *Alameda-Contra Costa Transit Dist.*, 434 P. 2d 982 (Cal. 1967), the members of Women for Peace brought suit

against a public Transit District, operating the municipal bus service, and a private advertising company which serviced the Transit District's buses. The buses contained advertising space above the passengers' seats, and the Transit District leased that space to the advertising company which, in turn, re-leased it to private commercial advertisers. (The parallel with FCC licensing of public property to private licensees who re-lease that frequency space to commercial advertisers is obvious.) In 1964, Women for Peace requested that it be allowed to place the following advertisement in defendants' coaches, at the standard rate:

> "Mankind must put an end to war or war will put an end to mankind."
>
> President John F. Kennedy.
>
> Write to President Johnson: Negotiate Vietnam.
> Women for Peace
> P. O. Box 944, Berkeley."

Defendants refused to accept the advertisement, on the ground that the advertisement conflicted with the District's advertising policy:

> The . . . District . . . accepts only commercial advertising for the sale of goods and services, except that political advertising will be accepted in connection with and at the time of a duly called election being held within the boundarys of the District, and further subject to the conditions that . . . space be made equally available to opposing candidates or sides of a ballot measure.

The advertisement in question was rejected on the ground that "controversial subjects" were not consistent with this policy. (Again, the parallels with WTOP-AM's policy, as well as the Commission's equal time doctrine, are obvious.)

The court first asserted that the content of the advertisement was "undeniably protected by the First Amendment," despite its status as a paid message, 434 P. 2d at 984. It then observed that the advertisements in question could not conceivably interfere with the District's primary function of providing transportation. 434 P. 2d at 985. And the court then defined the problem as one "in which a governmental agency [the parallel to WTOP-AM has been made in the previous section] has refused to accept an advertisement expressing ideas admittedly protected by the First Amendment for display in a forum which the agency has deemed suitable for the expression of ideas through the medium of paid advertisements." 434 P. 2d at 985. The court concluded:

> [D]efendants, *having opened a forum* for the expression of ideas by providing facilities for advertisements on its buses, *cannot* for reasons of administrative convenience decline to accept advertisements expressing opinions and beliefs within the ambit of First Amendment protection.

434 P. 2d at 985 (emphasis supplied). The "vice" of the district's censorship lay in choosing "between classes of ideas . . . , sanctioning the expression of only those selected, and banning all others." This the court described as "a most pervasive form of censorship." 434 P. 2d at 986.

The court also expressed itself with absolute bluntness on the perversity of elevating commercial speech to a status more important than political speech. "[I]n the totality of man's communicable knowledge," the court said, "that which bears no relationship to material value preponderates." 434 P. 2d at 986. The court observed:

> A cigarette company is permitted to advertise the desirability of smoking its brand, but a cancer society is not entitled to caution by advertisements

> that cigarette smoking is injurious to health. A theater may advertise a motion picture that portrays sex and violence, but the Legion of Decency has no right to post a message calling for clean films. A lumber company may advertise its wood products, but a conservation group cannot implore citizens to write to the President or Governor about protecting our natural resources, An oil refinery may advertise its products, but a citizens' organization cannot demand enforcement of existing air pollution statutes.

434 P. 2d at 986-87.

Finally, the court relied upon a companion case, *In re Hoffman*, 434 P. 2d 353 (Cal. 1967), to state the controlling issue before it: "the test is not whether petitioners' use of the station was a railway use, but whether it *interfered* with that use." 434 P. 2d at 356 (emphasis supplied). Because the bus company was unable to show that presentation of political commercials interferred with *any* legitimate function of its transportation function, its refusal to accept political advertising was impermissible.

The analogies to WTOP-AM are almost exact. WTOP-AM is, for purposes of the First Amendment, an "agent" of the state—just as was the private advertising agency leasing "public property" from the transit authority. WTOP-AM rejected BEM's advertisement, also on the ground that it accepted only "commercial" advertising. There was no evidence that acceptance of the advertisement would "interfere" with WTOP-AM's normal function of presenting advertising space to sponsors and entertainment programming to listeners. One must conclude, therefore, that WTOP-AM cannot reject BEM's advertisements any more than the transit authority could reject those of the Women for Peace.

In *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 328 (S.D.N.Y. 1967), the court reached precisely the same result as in *Wirta*, and for identical reasons. There too an anti-war group wanted to place an advertisement on the walls of the subway; a private advertising corporation, operating under contract to the city, refused, due to the "controversial" nature of the views expressed.

The Transit Authority made two arguments. First, they argued that they only accepted commercial advertisements, public service announcements, and political advertising during elections—and that acceptance of these was not a generalized waiver to include political advertisements. The Court quickly rejected this argument, stating that the Authority and the Advertising Company "cannot accept some posters and refuse the plaintiffs' for reasons that conflict with the First Amendment guarantee of the right to freedom of speech." 274 F. Supp. at 442. Second, the Transit Authority argued that the posters were inflammatory, would be displayed to a "captive audience," and might cause disorder and irritation. Again the court swiftly disposed of this argument. Citing *Terminiello* v. *City of Chicago*, 337 U.S. 1, 4 (1949), the court said:

> [A] function of free speech . . . is to invite dispute . . . . Speech if often provocative and challenging. It may . . . have profound unsettling effects. . . . That is why freedom of speech is . . . protected against censorship. . . .

The parallel with the case involving WTOP-AM again is obvious.

In *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969), a group of high school students brought an action for declaratory and injunctive relief to compel a high school newspaper to accept a paid advertisement in opposition to

the Vietnam war. The defendant school authority argued that the paper's policy was to accept "only purely commercial advertising" and to reject all advertising (even in support of student government nominees) which was politically oriented. Citing *Wirta*, the court ruled in the plaintiff's favor:

> Here, the school paper appears to have been open to free expression of ideas in the news and editorial columns as well as in letters to the editor. It is patently unfair in light of the free speech doctrine to close to the students the forum which they deem effective to present their ideas.

299 F. Supp. at 105. The court could see no disruption of the newspaper's normal function that could conceivably result from the anti-war advertisements.

Finally, in *Hillside Community Church, Inc. v. City of Tacoma*, 455 P. 2d 350 (Wash. 1969), a church group sought to place "end the war in Vietnam" posters on transit buses operated by the city of Tacoma, Washington, where advertising space was under the control of a private lessee advertising agency. Citing *Wirta and Kissinger*, the court ruled that "[o]nce a municipality or public body enters the field of advertising, therefore, the law requires that a showing of a 'clear and present' danger must be made in order to limit such advertising without conflicting with guarantees of freedom of speech under the First and Fourteenth Amendments." 455 P. 2d at 354. The court found the rejection to be "clear acts of censorship" in violation of plaintiff's first amendment rights.

The licensee has argued that subjects of the type contained in the BEM advertisements "require a more in-depth analysis than can be provided in a 10, 20, 30, or 60 second announcement." It seeks to use this pathetically weak justification to overcome the Supreme Court's "clear and present danger" test, see *Hillside*, *supra*, and the

First Amendment to the Constitution. This reasoning must be rejected out of hand. Once WTOP-AM has opened its forum up to 10, 20, 30, and 60 second commercial spots, it cannot withhold similar time periods from persons seeking to fill them with political speech. It borders on arrogance for WTOP-AM to assert that $4-5,000 automobiles which pollute the air and endanger human life may be sold to an unsuspecting public in 30 second spot announcements, but that the simple message, "End the War in Vietnam," cannot be communicated in a short announcement. Neither the government, nor a licensee, must be permitted to arrogate to itself the totalitarian role of deciding, *for the people wishing to speak*, how they will be permitted to present their thoughts. Similarly harsh and unjustifiable restrictions have been struck down in many other related cases, and I need not detail their reasoning here. See, *e.g.*, *Wolen* v. *Port of New York Authority*, 392 F. 2d 83 (2d Cir. 1968); *Tanner* v. *Lloyd Corp.*, 308 F. Supp. 128 (D. Ore. 1970); *In re Lane*, 457 P.2d 561 (Cal. 1969); *People* v. *St. Clair*, 288 N.Y.S. 2d 388 (Crim. Ct. 1968); *In re Hoffman*, 434 P.2d 353 (Cal. 1967); *Schwartz-Torrance Inv. Corp.* v. *Bakery & Con. Wkrs. U.*, 394 P.2d 921 (Cal. 1964).

The argument has been made that if WTOP-AM is forced to accept political advertisements, then commercial space will become limited. These arguments have also been considered by the courts, and summarily rejected. In *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 328 (S.D.N.Y. 1967), the court remarked:

> Defendants also argue that if they accept the posters for display, they will have to accept other posters relating to [political issues] . . . with the result that commercial advertising will become curtailed and the subways will become a political and ideological battlefield. Even if the Authority and

> the Advertising Company are required to accept the posters for display, however, it does not follow that others must be accepted. . . . [T]he Authority and the Advertising Company could impose reasonable regulations on the display of plaintiffs' posters and others of a similar nature as to the number to be displayed and the time and place for their display.

See also, *Farmer* v. *Moses*, 232 F. Supp. 154 (S.D.N.Y. 1964); *Wirta* v. *Alameda-Contra Costa Transit Dist.*, 434 P.2d 982 (Cal. 1967). Access to WTOP-AM's facilities for a "reasonable" number of political advertisements need not open the floodgates to a limitless political battleground—although in many respects this might be preferable to the existing commercial wasteland we see spread out before us today. Nothing would prevent the licensee or the Commission from adopting "reasonable" limitations on the number of both commercial and political advertisements to be broadcast.

Perhaps not surprisingly, the Commission has adopted precisely such an approach in prior cases. In *United Broadcasting Co. (WHKG)*, 10 F.C.C. 515 (1945), for example, a labor union filed a complaint against a licensee for refusing to sell the union time to solicit memberships and discuss controversial subjects (such as "race, religion, and politics"). The Commission designated the station's license renewal for hearing to determine "*the duties* of a licensee . . . to maintain an overall program balance by providing time on a nondiscriminatory basis for discussion of public controversial issues and for the solicitation of memberships for nonprofit organizations." *Id.* at 517 (emphasis supplied). During the hearing, it developed that the station's policies were governed by the Code of the National Association of Broadcasters. The Code provided that "no time shall be sold for the presentation of public controversial issues, with the exception of political broadcasts . . ., and that solicitation of mem-

berships in organizations, whether on paid or free time, should not be permitted except for charitable organizations, such as the American Red Cross. . . ." *Id.* at 516. Following the hearing, both parties filed a joint motion, stating that the licensee had adopted a new policy, and asking for dismissal of the proceedings. The new policy stated, in pertinent part:

> (a) . . . Station WHKC [will] . . . consider each request for time solely on its individual merits without discriminations and without prejudice because of the identity of the personality of the individual, corporation, or organization desiring such time.
>
> (b) Requests . . . will . . . be considered in the light of the contribution which their use of time would make toward a well-balanced program schedule. . . .
>
> (c) Station WHKC will make time available, primarily on a sustaining basis, *but also on a commercial basis*, for the full and free discussion of issues of public importance, including controversial issues, and dramatizations thereof. . . . [T]here will be *no discrimination between business concerns and nonprofit organizations*. . . . Nonprofit organizations will have the right to purchase time for solicitation of memberships.
>
> * * * *
>
> (e) The censorship of scripts is an evil repugnant to the American tradition of free speech and a free press, whether enforced by a Government agency or by a private radio station licensee. . . . Station WHKC will not censor scripts, or delete any matter contained in them. . . .
>
> (f) The station will see that its broadcasts on controversial issues . . . maintain a fair balance among the various points of view . . ., both sustaining and commercial alike.

> The parties believe that the above statement of policy properly sets forth *the duties* of a licensee under the Communications Act of 1934. . . .

United Broadcasting Co. (WHKC), supra at 516-17 (emphasis supplied).

The Commission, on the basis of this newly adopted policy statement, dismissed the proceedings. Stating that the policy was "fair and nondiscriminatory," *id.* at 518, we said:

> The Commission . . . is of the opinion that the operation of any station under the *extreme principles that no time shall be sold for the discussion of controversial public issues* and that only charitable organizations and certain commercial interests may solicit memberships is inconsistent with the concept of public interest established by the Communications Act as the criterion of radio regulations. . . . The Commission recognizes that good program balance may not permit the sale or donation of time to all who may seek it for such purposes and that difficult problems calling for careful judgment on the part of station management may be involved in deciding among applicants for time when all cannot be accommodated. However, competent management should be able to meet such problems in the public interest and with fairness to all concerned. The fact that it places an arduous task on management should not be made a reason for evading the issue by a *strict rule against the sale of time for any programs of the type mentioned.*

Id. at 518 (emphasis supplied).

The point is simply that the Commission has previously ruled that this policy comports with the "*duties*" of a licensee, and that refusals to sell time for the discussion of controversial issues of public importance would violate the 1934 Communications Act. The Commission clearly

stated that a "strict rule" against the sale of such time would be "extreme," and that "competent management" should be able to preserve balance and fairness between applicants. BEM asks for no more here. That this Commission has retrogressed in the 25 years since its *WHKC* opinion is a sad commentary indeed.

IV. SECTION 3(H) AND "COMMON CARRIERS"

Section 3(h) of the 1934 Communications Act provides, in rather uninformative fashion:

> "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy . . .; *but a person engaged in radio broadcasting shall not insofar as such person is so engaged, be deemed a common carrier.*

47 U.S.C. 153(h) (1964) (emphasis supplied). The majority has seized upon this general language to argue that a licensee has the power categorically to reject *all* requests by politically-oriented groups to purchase time. According to the majority, "[i]f the licensee were deemed to be a common carrier, . . . the result would be not only chaotic but a wholly different broadcasting system which Congress has not chosen to adopt." There are a number of reasons why this argument is faulty.

First, it is interesting to note that the Commission itself has rejected this argument in prior cases. In *United Broadcasting Co. (WHKG)*, 10 F.C.C. 515 (1945), for example, discussed above, the Commission clearly stated that Section 3(h) of the Act in no way interferred with the "duty" of licensees to make a reasonable amount of time available for purchase or on a sustaining basis to persons wishing to discuss issues of controversy and public importance:

> It is recognized, of course, that the physical limitations on the amount of spectrum space available for radio broadcasting and the large demands upon radio stations for use of time make it impossible for every person desiring to use the facilities of a station to be granted this privilege. Under section 3(h) of the act, broadcast stations are expressly declared not to be common carriers. These facts, however, in no way impinge upon the duty of each station licensee to be sensitive to the problems of public concern in the community *and to make sufficient time available, on a nondiscriminatory basis, for full discussion thereof, without any type of censorship which would undertake to impose the views of the licensee upon the material to be broadcast.* The spirit of the Communications Act of 1934 requires radio to be an instrument of free speech, subject only to the general statutory provisions imposing upon the licensee the responsibility of operating its station in the public interest.

Id. at 517-18 (emphasis supplied).

Second, it seems clear, at least from the cited passage, that Section 3(h), whatever its function, was not designed to permit licensees flatly to reject advertisements for non-commercial or controversial causes. It seems likely that Congress, in enacting Section 3(h), intended only to make the rather detailed and complicated "Common Carrier" provisions in Title II of the 1934 Act inapplicable to broadcasting. A right of reasonable access, sought here by BEM, would certainly be consistent with the principles enunciated in *United Broadcasting Co. (WHKC), supra,* without involving Title II of the Act. Obviously, even under the access principles sought by BEM a licensee would not be forced to take *everyone* who sought air time. After all, a licensee may not have enough airtime or frequency space available to accommodate all those wishing to advertise. But it does not fol-

low, either, that a licensee can *exclude* everyone who seeks access. There are many ways of permitting reasonable access by non-commercial advertisers without having to accept them all. Licensees, for example, might decide to accept 50% commercial and 50% non-commercial advertising. In each category, some might be turned away—for any number of reasons. But the broadcaster would still be obligated to maintain an adequate "balance" between viewpoints for purposes of the fairness doctrine. And we have already ruled that "competent management should be able to meet such problems in the public interest." *United Broadcasting Co. (WHKC)*, 10 F.C.C. 515, 518 (1945). This principle was underscored by the court in *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966), when it said:

> The argument that a broadcaster is not a public utility is beside the point. True it is not a public utility in the same sense as strictly regulated common carriers or purveyors of power, but neither is it a purely private enterprise like a newspaper or an automobile agency.

Id. at 1003.

A third defect in the majority's reasoning is that the Commission itself has, on several occasions, limited the discretion of licensees to accept or reject persons wishing to use their facility to express views. *In Letter to Nicholas Zapple*, FCC 70-598 (1970), for example, we ruled that when a spokesman for a political candidate appears in support of that candidate over a radio or television station, then, even though the equal time requirements of Section 315(a) of the Communications Act are inapplicable, the licensee *must* nevertheless give equal opportunities to supporters of the opposing candidate. Such opposing supporters would not only be the "appropriate" and "logical" persons to reply, but as we stated, "it would

not be reasonable" for a licensee to refuse such a spokesman time. In 1968, on another occasion, we stated that under certain circumstances the fairness doctrine would require a licensee to put on one particular person—where "[t]here is a clear and appropriate spokesman to present the other side of the attack issue—the person or group attacked." *Memorandum Opinion and Order*, 12 F.C.C. 2d 250, 252-53 (1968).

The point is simply that these requirements do not violate Section 3(h) of the Act, even if they do require a licensee to accept the programming offered by a specific person. A system of reasonable access is perfectly consistent with Section 3(h) of the Act. Not only that, it is *required* by the First Amendment under the principles described above. The principles and policies of the First Amendment do not dictate the amount of non-commercial advertising licensees must accept. They require only that licensees must accept *some* non-commercial advertising, and that the amount accepted must be *reasonable.*

CONCLUSION

In sum, BEM's advertisements are protected speech under the First Amendment; WTOP-AM's actions in rejecting the advertisements subject it, under concepts of state action, to the restraints and policies of that Amendment; WTOP-AM has presented no reasonable justification for its discrimination between commercial and non-commercial advertising; and Section 3(h) of the Communications Act is perfectly consistent with procedures permitting a right of reasonable access to the broadcasting media for political advertisements.

Accordingly, I would grant the petitioners' request and enforce their demand for access to the public facilities guarded so zealously by the licensee. This the majority has refused to do. I dissent.

V

Relevant Pleadings Before the United States Court of Appeals (D.C. Cir.) in *Democratic National Committee* v. *Federal Communications Commission*, No. 24,537

and

Business Executives' Move for Vietnam Peace v. *Federal Communications Commission*, No. 24,492

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 24,537

DEMOCRATIC NATIONAL COMMITTEE,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR REVIEW

The Democratic National Committee hereby petitions the Court for review, pursuant to Section 402(a) of the Communications Act of 1934, 47 U.S.C. § 402(a), and 28 U.S.C. § 2344, of the Memorandum Opinion and Order of the Federal Communications Commission released August 12, 1970 (FCC 70-861), a copy of which is annexed hereto.

Respectfully submitted,

DEMOCRATIC NATIONAL COMMITTEE

By _____

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August 13, 1970

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24492

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,
Respondents.

AMENDED PETITION FOR REVIEW OF COMMISSION ACTION AND FOR TEMPORARY RELIEF

This amended petition seeks an order setting aside the Federal Communications Commission's action denying petitioners' complaint and seeks temporary relief pending action by the Commission. A copy of the Commission's action, dated August 5, 1970, was filed herein by the Respondent Commission on August 14, 1970.

I. *Jurisdiction and Venue*

1. This Court has jurisdiction under the Communications Act of 1934, as amended, 47 U.S.C. § 402(a); the Judicial Review Act, 28 U.S.C. § 2342-2343; and the Administrative Procedure Act, 5 U.S.C. §§ 704-706. Venue in this Court is proper under 28 U.S.C. 2343.

II. *Parties*

2. Petitioner Business Executives' Move for Vietnam Peace ("BEM") is an organization composed of over 3,000 business executives and owners from 49 states. It maintains offices in Baltimore, Maryland, and at 201 Massachusetts Avenue, N.E., Washington, D.C. 20002.

3. Respondent Federal Communications Commission ("FCC" or "the Commission") is an agency of the United States government. The United States of America is named as a Respondent pursuant to 28 U.S.C. 2344.

III. *Facts*

4. On January 22, 1970, BEM filed a Letter of Complaint against radio station WTOP with the Commission's Broadcast Bureau, Complaints and Compliance Division. A copy of the Complaint is attached as Exhibit A to the original petition filed in this action. The Complaint asserted that WTOP's refusal to sell air time to BEM for broadcast of certain advertisements expressing views in opposition to the Vietnam war violates the Commission's "Fairness Doctrine," provisions of the Communications Act, and the First Amendment to the United States Constitution. BEM requested that the Commission order WTOP to provide BEM with free air time to broadcast its views or, in the alternative, sell such time to BEM at prevailing rates. BEM requested expedited processing of its complaint to assure that its "announcements reach the air at their most propitious time." BEM stated that "the Vietnam War is a current and changing issue. Each day that WTOP denies air time to BEM's announcements, BEM is denied the opportunity to broadcast its views in a timely way." (Ex. A, p. 5).

5. WTOP filed a response to BEM's complaint on February 5, 1970; BEM filed a reply on February 16, 1970; and, on February 19, 1970, BEM by letter to the Chief of the Commission's Complaints and Compliance Division, requested that the matter be referred directly to the full Commission, again emphasizing the need for expedited action and requesting that the Commission rule within three weeks. Other filings were made by the parties, the last of which was filed with the Commission on

April 7, 1970. Two months later, having received no ruling from the Commission, BEM's counsel, by letter to the Commission's chairman dated June 10, 1970 (with copies to all Commissioners and to the Chief of the Commission's Complaints Division), requested an immediate Commission ruling on its Complaint. This letter once again emphasized the fundamental and irretrievable nature of the First Amendments rights in issue. After further requests by BEM for expedited action met with no success, the original petition was filed in this action on July 31, 1970.

6. One week after the filing of the petition herein, the Commission announced that it had reached a decision and, on August 14, 1970, mailed copies of its action and concurring and dissenting statements to BEM and to the clerk of this Court.

7. The majority of the Commission rejected BEM's claims made under The Fairness Doctrine, The Communications Act and The First Amendment. Commissioner Johnson, dissenting, would grant BEM's complaint on First Amendment grounds and direct WTOP to sell BEM airtime on which to broadcast editorial advertisements. A copy of Commissioner Johnson's dissent is attached to BEM's Motion to Amend filed herein on August 20, 1970.

8. The Commission's denial of BEM's complaint is not in accordance with law, is not substantiated by substantial evidence, and is contrary to the First Amendment to the United States Constitution.

9. The denial of BEM's complaint by the Commission has caused, and the absence of a preliminary injunction by this Court ordering the Commission to direct WTOP to sell BEM airtime at its prevailing rates pending disposition of this Petition will cause irreparable injury to petitioner BEM and to the public.

WHEREFORE, petitioner prays that this Court:

1. Review and reverse the order of the Federal Communications Commission;

2. Suspend its Rules to order an immediate hearing on the Motion for Temporary Relief;

3. Preliminarily order respondent FCC to direct its licensee WTOP to sell BEM reasonable air time for the broadcasting of its views on the Vietnam War;

4. Retain jurisdiction over the parties to assure that respondent FCC complies with the order or writ of this Court and the applicable provisions of law;

5. Assess all taxable costs to respondents;

6. Provide for expeditious disposition of this matter; and

7. Grant Petitioner such other and further relief as may be appropriate.

/s/ Thomas R. Asher
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/s/ Michael Schneiderman
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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 24,537

DEMOCRATIC NATIONAL COMMITTEE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

MOTION FOR LEAVE TO INTERVENE

American Broadcasting Companies, Inc. (ABC), by its attorneys, pursuant to 28 U.S.C. Sec. 2348 and Rule 15 (d) of the Federal Rules of Appellate Procedure, hereby moves to intervene in the above-referenced proceeding:

1. The Democratic National Committee has petitioned for review of a Memorandum Opinion and Order of the Federal Communications Commission released August 12, 1970 (FCC 70-861).

2. ABC was a party to the proceeding of which review is there sought. It operates nationwide radio and television networks, and holds broadcast licenses issued by the Federal Communications Commission. ABC thus will be affected if the aforesaid Order is enjoined, set aside, or suspended. Therefore, ABC is entitled to appear (intervene) as a party of its own motion and as of right in this proceeding under 28 U.S.C. Sec. 2348.

WHEREFORE, ABC respectfully requests that this Motion for Leave to Intervene be granted.

Respectfully submitted,

/s/ James A. McKenna, Jr.
JAMES A. MCKENNA, JR.

/s/ Vernon L. Wilkinson
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August 27, 1970

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

File No. 24537

DEMOCRATIC NATIONAL COMMITTEE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,
Respondents.

MOTION FOR LEAVE TO INTERVENE

Columbia Broadcasting System, Inc. respectfully moves for leave to intervene in the above-entitled proceeding. In support thereof, it shows as follows:

1. Columbia Broadcasting System, Inc. is the licensee of five television stations, seven standard (AM) radio stations, and seven FM radio stations.

2. The above-entitled proceeding is a petition for review of an order of the Federal Communications Commission (FCC) released August 12, 1970, FCC Release No. 70-861, denying in part Petitioner's request for a declaratory ruling that a broadcast licensee may not refuse to sell time to any "responsible entity" for the solicitation of funds or for comment on public issues.

3. The Petitioner apparently seeks herein to have the aforementioned order of the Commission set aside or modified in some respect.

4. Columbia Broadcasting System, Inc. was a party to the proceeding before the Commission leading to issuance of the order sought to be reviewed herein. Its freedom to select broadcast programming would be substan-

tially restricted by a grant of the relief which Petitioner requested before the Commission, thus affecting its interests as a broadcast licensee. It is therefore entitled as of right to intervene in this proceeding pursuant to 28 U.S.C. § 2348.

WHEREFORE, the Columbia Broadcasting System, Inc. pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure, respectfully moves this Court for leave to intervene and be made a party to the above-entitled proceeding for all purposes.

/s/ J. Roger Wollenberg
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August 31, 1970

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24492

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

MOTION FOR LEAVE TO INTERVENE

Post-Newsweek Stations, Capital Area, Inc., licensee of standard broadcast station WTOP (hereafter "WTOP"), moves for leave to intervene in this proceeding. In support of this motion, the following is shown:

1. By order dated September 11, 1970, this Court granted leave to petitioner to amend a document previously on file with the Court and directed the Clerk to file the document so amended as a petition for review.

2. This proceeding involves review of a decision of the Federal Communications Commission, dated August 5, 1970, denying petitioner's request for a ruling that WTOP had violated the Commission's Fairness Doctrine in its coverage of the Vietnam War issue and that petitioner was entitled to have its announcements carried by WTOP. WTOP participated in the proceeding below.

3. The relief here requested by petitioner relates directly to the operation of radio station WTOP. Thus, WTOP could be materially affected by the decision in this case. The position of WTOP will not be fully represented by any other party to this proceeding.

4. Counsel for petitioner and for respondents have authorized the undersigned to state that they have no objection to the immediate consideration and grant of this motion.

Respectfully submitted,

/s/ Ernest W. Jennes
ERNEST W. JENNES

/s/ Charles A. Miller
CHARLES A. MILLER
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Counsel for
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Capital Area, Inc.

September 23, 1970

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,537

DEMOCRATIC NATIONAL COMMITTEE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

AMERICAN BROADCASTING COMPANIES, INC.,
and COLUMBIA BROADCASTING SYSTEM, INC.,
Intervenors.

MOTION TO SET CASE FOR ARGUMENT WITH RELATED CASE

Columbia Broadcasting System, Inc. (CBS), intervenor in the above-captioned case, hereby respectfully moves this Court to set the case for argument immediately preceding or following the argument in *Business Executives Move for Vietnam Peace* v. *FCC*, No. 24,492 (currently scheduled for argument on March 9, 1971) and before the same division of the Court. In support thereof, CBS states as follows:

1. The Commission's rulings in the two cases in question were issued on the same day, and involve closely related issues. In its ruling on review in this case, the Commission held that broadcast licensees are not required to sell time to political parties and other "responsible entities" for the discussion of controversial issues. *Democratic National Committee*, 24 F.C.C.2d 216 (1970). In its ruling on review in No. 24,492, the Commission held that a particular licensee was not required to sell

time for spot announcements presenting views on controversial public issues. *Business Executives Move for Vietnam Peace*, 24 F.C.C.2d 242 (1970). In that latter ruling, the Commission expressly relied on its holding in the *Democratic National Committee* case. 25 F.C.C.2d at 247. Moreover, petitioner in No. 24,492 itself brought to this Court's attention the fact that the Commission's decision on review in this case had been treated by the Commission as a "companion case," and included that opinion in the Appendix filed in No. 24,492. See Brief for Petitioner in No. 24,492, p. 2.

2. While the two cases arose in different factual settings and should not be consolidated, they involve common and related issues of law of great importance to the administration of the Communications Act of 1934. It is therefore appropriate that they be heard and decided by a single division of this Court.

3. Under the present briefing schedule, all briefs in No. 24,537 will be filed before March 9, 1971.

Respectfully submitted,

/s/ Timothy B. Dyk
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February 9, 1971

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 24,537

DEMOCRATIC NATIONAL COMMITTEE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

AMERICAN BROADCASTING COMPANIES, INC.,
and COLUMBIA BROADCASTING SYSTEM, INC.,
Intervenors.

OPPOSITION TO ANY FURTHER DELAY IN NO. 24,492

On February 9, 1971, the Columbia Broadcasting System, Inc. (CBS), intervenor in *Democratic National Committee* v. *F.C.C.*, No. 24,537, filed a motion to have their case set for argument concurrently with the above-captioned case which has been set, pursuant to expedited scheduling, for argument on March 9, 1971. Although Business Executives Move for Vietnam Peace (BEM) takes no position on when oral argument is set in No. 24,537, BEM strenuously opposes any change in the scheduled date of its argument for the following reasons:

1. On January 22, 1971, BEM filed a letter of complaint against radio station WTOP with the Federal Communications Commission. The complaint alleged violation of BEM's right to speak in contravention of the First Amendment. Responsive pleadings followed, but the Com-

mission, despite repeated requests for expedited action, had failed to resolve the matter by July 31, 1970. On that date, in an exasperated appeal for action, BEM filed a petition in this Court for "Review of Commission Inaction Equivalent to an Order Denying Relief and for Temporary Relief".

2. On August 5, 1970, in a letter-opinion to Counsel for BEM, the F.C.C. denied BEM's requested relief, *Business Executives Move for Vietnam Peace*, 25 F.C.C. 2d 242 (1970).

3. On August 20, 1970 BEM filed an "Amended Petition for Review of Commission Action and for Temporary Relief" praying again for expedited action in view of the irreparable injury being caused BEM and the public.

4. On September 29, this Court denied BEM's request for Temporary Relief but ordered Counsel for the parties to agree upon an expedited briefing schedule. On October 20, 1970, by order of Court, an expedited briefing schedule was set.

5. All briefs having been filed by January 25, 1971, the Court, pursuant to the expedited scheduling of this proceeding, set oral argument for March 9, 1971.

6. BEM has repeatedly contended that continued delays have caused irreparable injury both to themselves and to the public. Consequently, BEM has sought expedited actions throughout these proceedings.

7. BEM is currently awaiting resolution of matters which are denying their fundamental First Amendment rights. As these issues await Court action, the Indochina conflict is escalating and effective opposition to the war has been silenced.

8. BEM is opposed, therefore, to any action which will cause any further delay in either the argument or decision in its case.

Respectfully submitted,

/s/ Thomas Asher
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/s/ Albert H. Kramer
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February 10, 1971

[Certificate of service omitted in printing]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,537

DEMOCRATIC NATIONAL COMMITTEE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

AMERICAN BROADCASTING COMPANIES, INC.,
COLUMBIA BROADCASTING SYSTEM, INC.,
Intervenors.

RESPONSE TO MOTION CONCERNING ORAL ARGUMENT

Respondent Federal Communications Commission takes no position with respect to the request of CBS that oral argument in this case be heard by the same panel on the same day as the argument in Case No. 24,492,[1] presently scheduled for March 9, 1971. However, in considering that request, which is premised on the fact that similar questions of law may arise in the two cases, we believe that the Court should be aware of the further fact that the same or related legal questions are also presented by a number of other appeals now pending in various procedural postures. These appeals include *Friends of the Earth and Gary A. Soucie* v. *F.C.C. and U.S.A.*, Case No. 24,556; *David Green, Individually and as Chairman of the Peace Committee of the Baltimore Meetings of the Religious Society of Friends* v. *F.C.C.*

[1] *Business Executives' Move for Vietnam Peace* v. *F.C.C. and U.S.A. (BEM).*

and U.S.A., Case No. 24,470; *G.I. Association, Stephen P. Pizzo, individually and behalf of the G.I. Association, Women For Peace, Hazel Grossman, individually and behalf of the Women for Peace, the Resistance, Lowell Turner, individually and behalf of the Resistance* v. *F.C.C. and U.S.A.*, Case No. 24,516; *Business Executives Move for Vietnam Peace, Los Angeles Chapter* v. *F.C.C. and U.S.A.*, Case No. 24,701. In this connection it is perhaps also noteworthy that while the instant appeal is from a declaratory ruling on what is a relatively pure legal question, all of the other cases, including *BEM*, arose in the context of various actions taken on different and unique facts, and in that sense bear a closer relationship to each other than does any one to the present case.

Respectfully submitted,

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February 16, 1971

[Certificate of service omitted in printing]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,537

DEMOCRATIC NATIONAL COMMITTEE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

AMERICAN BROADCASTING COMPANIES, INC.,
and COLUMBIA BROADCASTING SYSTEM, INC.,
Intervenors.

REPLY TO FCC'S RESPONSE TO MOTION TO SET CASE FOR ARGUMENT WITH RELATED CASE

On February 9, 1971, Columbia Broadcasting System, Inc. (CBS), intervenor in the above-captioned case, moved this Court to set the case for argument on the same day and before the same division of this Court scheduled to hear argument in *Business Executives Move for Vietnam Peace* v. *FCC*, No. 24,492, presently scheduled for argument on March 9, 1971. On February 16, 1971, the Federal Communications Commission (the Commission) filed a response to that motion, stating that it "takes no position" with respect to the motion. However, the Commission suggests that four additional cases pending before this Court involve "the same or related legal questions" as those presented in this case and No. 24,492, pointing to: *Friends of the Earth* v. *FCC*, No. 24,556; *Green* v. *FCC*, No. 24,470; *GI Association* v. *FCC*, No. 24,516; and *Business Executives Move for Vietnam Peace, Los Angeles Chapter* v. *FCC*, No. 24,701.

We suggest that the Commission has incorrectly characterized those cases. All involve petitions for review of Commission holdings with respect to the fairness doctrine. Thus, in No. 24,556, the question presented is whether commercial advertisements for automobiles and gasoline present one side of a controversial issue (pollution) requiring that the licensee present the opposing views of the petitioner. See the Commission's decision at 24 F.C.C.2d 743 (1970). In No. 24,470, the question is whether the broadcast of military recruiting messages presents one side of a controversial public issue requiring the licensees involved to present the opposing viewpoints of the petitioners. See the Commission's decision at 24 F.C.C.2d 171 (1970). The same basic fairness doctrine issue concerning military recruiting announcements is involved in No. 24,516. See the Commission's ruling at 24 F.C.C.2d 156 (1970). Finally, in No. 24,701, in which none of the briefs has yet been filed with this Court, petitioner is seeking review of the Commission's holding that equal time need not be provided to opponents of the President's views on the Indochina War immediately following every Presidential appearance on that subject. See the Commission's ruling at 25 F.C.C.2d 283, 294-98 (1970).

In the present case and in No. 24,492, on the other hand, the issue is not whether any licensees have violated the fairness doctrine but whether—apart from the fairness doctrine—there is a right under the First Amendment or the Communications Act for any particular individual or group to purchase broadcast time to present his or its particular views. It is this basic issue that is common to this case and No. 24,492, and that is not presented in any of the other cases cited by the Commission in its response to the CBS motion. And it is this basic common issue that makes it appropriate for a single

division of the Court to hear these two cases consecutively.

Respectfully submitted,

/s/ Timothy B. Dyk
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February 17, 1971

[Certificate of service omitted in printing]

VI.

Opinions and Orders
of the
United States Court of Appeals
(D.C. Cir.)
Democratic National Committee
v. *Federal Communications Commission*
No. 24,537

and

Business Executives Move for Vietnam Peace
v. *Federal Communications Commission*
No. 24,492

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1970

No. 24,537

DEMOCRATIC NATIONAL COMMITTEE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
& UNITED STATES OF AMERICA,
Respondents,

AMERICAN BROADCASTING CO., INC.,
Intervenor,

COLUMBIA BROADCASTING SYSTEM, INC.
Intervenor.

Before: Bazelon, Chief Judge.

ORDER

On consideration of the motion of intervenor, Columbia Broadcasting System, Inc., to set case for argument with No. 24,492 and of the response, it is

ORDERED that the motion be granted and the above entitled case is hereby scheduled for argument on the merits at 10:00 a.m. March 9, 1971.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,492

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS
POST-NEWSWEEK STATIONS, CAPITAL AREA, INC., INTERVENOR

No. 24,537

DEMOCRATIC NATIONAL COMMITTEE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS
AMERICAN BROADCASTING COMPANIES, INC. and COLUMBIA BROADCASTING SYSTEM, INC., INTERVENORS

Petitions for Review of Orders of the Federal Communications Commission

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Decided August 3, 1971

Mr. Thomas R. Asher, with whom *Messrs. Albert H. Kramer* and *Michael Schneiderman* were on the brief, for petitioner in No. 24,492.

Mr. Joseph A. Califano, Jr., with whom *Messrs. David H. Lloyd* and *Irvin B. Nathan* were on the brief, for petitioner in No. 24,537.

Mr. Daniel R. Ohlbaum, Deputy General Counsel, Federal Communications Commission, for respondents.

Messrs. John H. Conlin, Associate General Counsel, and *Stuart F. Feldstein*, Counsel, Federal Communications Commission, were on the brief for respondents in No. 24,492. *Mr. John H. Conlin* and *Miss Katrina Renouf*, Counsel, Federal Communications Commission, were on the brief for respondents in No. 24,537.

Mr. Henry Geller, General Counsel, Federal Communications Commission, at the time the record was filed, also entered an appearance for respondent Federal Communications Commission in No. 24,492.

Mr. Howard E. Shapiro, Attorney, Department of Justice, entered an appearance for respondent United States of America.

Mr. Ernest W. Jennes, with whom *Messrs. Charles A. Miller* and *Henry Goldberg* were on the brief, for intervenor in No. 24,492.

Mr. J. Roger Wollenberg, with whom *Messrs. Timothy B. Dyk* and *Daniel Marcus* were on the brief, for intervenor Columbia Broadcasting System, Inc. in No. 24,537.

Messrs. James A. McKenna, Jr. and *Vernon L. Wilkinson* were on the brief for intervenor American Broadcasting Companies, Inc. in No. 24,537.

Before WRIGHT, MCGOWAN and ROBINSON, *Circuit Judges.*

Opinion filed by WRIGHT, *Circuit Judge.*

Dissenting opinion filed by MCGOWAN, *Circuit Judge.*

WRIGHT, *Circuit Judge:* In these cases we are asked to decide whether a broadcast licensee may, as a general policy, refuse to sell any of its advertising time to groups or individuals wishing to speak out on controversial public issues. The Federal Communications Commission concluded that such a policy is permissible.[1] We reverse the Commission's decision. And we remand for further proceedings.

The principle at stake here is one of fundamental importance: it concerns the people's right to engage in and to hear vigorous public debate on the broadcast media. More specifically, it concerns the application of that right to the substantial portion of the broadcast day which is sold for advertising. For too long advertising has been considered a virtual free fire zone, largely ungoverned by regulatory guidelines. As a result, a cloying blandness and commercialism—sometimes said to be characteristic of radio and television as a whole—have found an especially effective outlet. We are convinced that the time has come for the Commission to cease abdicating responsibility over the uses of advertising time. Indeed, we are convinced that broadcast advertising has great potential for enlivening and enriching debate on public issues, rather than drugging it with an overdose of non-ideas and non-issues as is now the case.

Under attack here is an allegedly common practice in the broadcast industry—airing only those paid presentations which advertise products or which deal with "non-controversial" matters, and confining the discussion of controversial public issues to formats such as the news or documentaries which are tightly controlled and edited by the broadcaster. In the Comission's view, an attack on

[1] *Business Executives Move for Vietnam Peace*, 25 F.C.C.2d 242 (1970); *Democratic National Committee*, 25 F.C.C.2d 216 (1970).

the permissibility of this practice "goes to the heart of the system of broadcasting which has developed in this country." [2] We disagree. The actual issue before us is relatively narrow and we decide it narrowly. We do not have to cut to the "heart" of our system of broadcasting; we leave undisturbed the licensee's basic right to exercise judgment and control in public issue programming and the sale of advertising time. All we do is forbid an *extreme* form of control which totally excludes controversial public debate from broadcast advertising time.

We hold specifically that a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted. We do not hold, however, that the planned announcements of the petitioners—or, for that matter, of any other particular applicant for air time—must necessarily be accepted by broadcast licensees. Rather, we confine ourselves to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many "editorial advertisements" will be put on the air.

I

Both petitioners in these cases are organizations whose primary *modus operandi* is public persuasion and communication. As a rule, they do not attract attention to their views by performing newsworthy acts, such as engaging in civil disobedience or organizing mass demonstrations. They depend, instead, on their ability to get a hearing—as full as possible and as direct as possible—from the general public. Surely radio and television would seem to be the most effective media for their purposes. Yet

[2] *Democratic National Committee, supra* Note 1, 25 F.C.C.2d at 221.

they contend that their self-expression on those media—and, therefore, the public's access to their views—is significantly inhibited by broadcaster policies barring any and all paid editorial messages from the airwaves.

The Business Executives Move for Vietnam Peace (BEM) is a national organization of over 2,700 business owners and executives, organized in opposition to the war. BEM apparently believes that it is in a position to offer the public a unique viewpoint on what is no doubt one of the great political and moral issues of our time. In order to communicate that viewpoint, it prepared several recorded one-minute radio announcements. The announcements urged "immediate withdrawal of American forces from Vietnam and from other overseas military installations" and featured statements by leading businessmen and retired military officers whose views may carry particular weight with the general public. BEM sought to buy time to air these announcements on the broadcast media, just as commercial advertisers do. It must have seemed an extraordinarily effective means of directly communicating its ideas and sense of urgency to the broad listening audience.

In June 1969 BEM sought to purchase time for its announcements on WTOP, an all-news radio station in the nation's capital. Like most broadcasters, WTOP sells substantial amounts of time for short advertisements. Yet over a period of eight months it repeatedly refused to sell any time to the business executives. WTOP cited no particular objection to the planned announcements. Rather, it relied solely upon an across-the-board policy barring all editorial advertisements—"its long established policy of refusing to sell spot announcement time to individuals or groups to set forth views on controversial issues." [3]

[3] WTOP also stated "that 'subjects of this type require a more in-depth analysis than can be provided in a 10, 20, 30 or 60 second

BEM then filed a complaint with the Federal Communications Commission alleging violations of both the fairness doctrine and the First Amendment.

The Democratic National Committee (DNC) came to the Commission with much the same sort of complaint. It stated that it was in the process of planning an extensive media campaign to communicate the Democratic Party's views on crucial issues and to solicit funds. In our political system, it is of obvious importance that the public have access—as direct and full as possible—to the views of the political parties. A party currently out of office may well regard such communication as particularly vital. Yet DNC alleged that it confronted several obstacles to direct self-expression on the broadcast media, among them the refusal of some broadcasters to sell time for comment on controversial public issues. Unlike the business executives, DNC did not complain of any individual refusal to sell time for a particular editorial advertisement. Rather, it cast the issue in a somewhat different light by seeking a declaratory ruling from the Commission that "[a] broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues."

The Commission considered the two cases together and rejected the arguments of both BEM and DNC on the same day. The issues involved did not overlap completely. For example, the Commission found a defect in the vagueness and generality of BEM's fairness doctrine com-

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announcement.'" *Business Executives Move for Vietnam Peace*, *supra* Note 1, 25 F.C.C.2d at 242. There is no indication, however, that WTOP's "long established policy" of refusing to sell time for *any* controversial advertisement would have permitted it to sell BEM 5 minutes or 10 minutes for a more "in-depth" treatment of its antiwar views. For a discussion of the permissibility of a flat ban on "short" public issue advertisements, *see* text at pages [Apps. 472-73] *infra*.

plaint,[4] and it resolved DNC's contention concerning fund solicitation by noting that all three television networks had agreed to accept such solicitations and by stating that any broadcaster policy of confining solicitations to election periods alone "would appear arbitrary."[5] On the matters central to these petitions for review, however, the Commission resolved both cases in the same fashion, and we, therefore, are also considering them as one.

The Commission held that it is permissible for a broadcast licensee to follow a general policy of rejecting all editorial advertisements. The essence of its reasoning in the two cases was as follows: First, it interpreted the fairness doctrine to allow rejection of paid controversial

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[4] In its original complaint, BEM alleged generally that WTOP had failed to cover antiwar views fully and fairly. However, it offered no specific proof whatever of its allegations, and WTOP, on the other hand, offered a lengthy compilation of news and interview shows which aired the opinions of some antiwar groups and individuals. BEM has not pressed its fairness doctrine argument on appeal, but rather has relied solely upon the First Amendment right-of-access contention which it also made before the Commission. Therefore, we need not consider here the Commission's holding that BEM failed to shoulder its full burden of going forward under the fairness doctrine.

[5] All three television networks also commented on the sale of time for editorial advertising. CBS stated it would sell no time for such advertising, although an exception would be made for broadcasts on behalf of political candidates or ballot propositions. ABC said it would not sell time to most groups for public issue advertising since that would inspire a "flood" of requests, but it would "be prepared, consistent with its other obligations, to accept such orders for time from major political parties as can be accommodated on a reasonable basis." And NBC stated it "has no policy which would prevent the purchase of program time envisioned by DNC." We are constrained to note here that any discrimination in the sale of editorial advertising time in favor of political parties alone or the "major" political parties—and totally excluding other more issue-oriented groups or "minor" political parties—would be highly suspect under the First Amendment. *See* text as pages [Apps. 477-79] *infra*.

announcements. The doctrine, evolved by the Commission and endorsed generally in the Communications Act, demands that all controversial issues of public importance be covered both fully and fairly by broadcasters. Yet the Commission held that it leaves the licensees broad leeway to exercise their professional judgment as to "the format for presentation of controversial issues 'and all other facets of such programming.'" Editorial advertising, the Commission said, is simply one of several possible formats for coverage of public issues. Under the permissive "reasonableness" standard of the fairness doctrine, acceptance of that particular format is by no means compulsory.

Second, the Commission interpreted the First Amendment to be equally permissive. Its reasoning on this point was rather sparse. It made no effort, for example, to identify the peculiar First Amendment interests attaching to paid editorial announcements as opposed to coverage of controversial issues on news, interview or discussion programs. Instead, it was content to raise the spectre of the "chaos" and other practical difficulties that, it said, would attend a right of access to the broadcast media. The Commission concluded that the fairness doctrine's requirement of full and fair coverage—tolerant as it is of a flat ban on the editorial advertisement format of expression—provides as much protection of public debate as the First Amendment demands.

Before this court, both petitioners make substantially the same attack on the Commission's decision. They do not ask for a ruling that *all* editorial advertisements submitted to broadcasters must be accepted. Nor do they seek to foreclose entirely the broadcasters' exercise of reasonable discretion. What they advocate is a *limited* right of access to radio and television for paid public issue announcements. They attack the Commission's ruling

that a total exclusion of such announcements is permissible.

II

Petitioners have left no stone unturned in their attack on the exclusion of editorial advertising. They have invoked the Communications Act's "public interest" requirement [6] and the statutory-regulatory fairness requirement [7]—as well as First Amendment principles—to support their argument. In other contexts, we might attempt to avoid the constitutional issue by coming to a decision on nonconstitutional grounds. But that course is neither fruitful nor possible here.

Speaking specifically of the Commission, the Supreme Court has stressed the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 381 (1969). Thus the nonconstitutional question here is whether there are "compelling indications" that the public interest and fairness requirements compel some opening for public issue advertisements on radio and television. In matters of allocating burdens, reforming procedures and ensuring full attention to all relevant factors in agency decision making, we have not been reluctant to reverse the Commission in order to vindicate "the public interest." [8] We have also intervened to see that broad policies developed by the Commission un-

[6] 47 U.S.C. §§ 307(d), 309(a) (1964).

[7] 47 U.S.C. § 315(a) (1964). For a discussion of the regulatory development of the fairness doctrine and its eventual adoption in the Communications Act, *see Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 375-381 (1969).

[8] *See, e.g., Office of Communication of United Church of Christ* v. *F.C.C.*, 123 U.S.App.D.C. 328, 359 F.2d 994 (1966); 138 U.S. App.D.C. 112, 425 F.2d 543 (1969).

der the fairness doctrine are applied fully and consistently to all cases.[9] However, when we are asked to reverse major substantive interpretations of the grand and open-ended statutory requirements, we tread somewhat more difficult terrain. Obviously, the requirements mean something and there must be a great range of actions which they foreclose to the Commission; but, in establishing the necessary guidelines, we must ourselves seek extrinsic guidance.

In these cases, that guidance comes from the Constitution. Petitioners have presented no "compelling" evidence from legislative history to indicate a congressional policy in favor of, or even a real congressional attention to, editorial advertising. Rather, their arguments on the nonconstitutional points closely parallel their constitutional arguments. The general policy considerations which they invoke encompass all of the interests that would have to be evaluated under the relevant First Amendment law. It would make no sense for us to blind ourselves to the constitutional status of those interests and to the doctrine that has been build up around them.

What then must be the "compelling indications" we are to consider? The ones which seem to us truly "compelling" involve First Amendment principles. Thus we conclude that the constitutional question must be faced and is, indeed, the essence of these cases. Whether our decision is styled as a "First Amendment decision" or as a decision interpreting the fairness and public interest requirements "in light of the First Amendment" matters little.

III

It has always been clear that the broadcast media—so vital to communication in our society—are affected by

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[9] *See, e.g., Retail Store Employees Union Local 880* v. *F.C.C.*, —— U.S.App.D.C. ——, 436 F.2d 248 (1970).

strong First Amendment interests.[10] Yet the nature of those interests has not been so clear; an evolution of constitutional principles in this area is still very much in progress. Until quite recently, the only interest raised to constitutional status was that of the broadcast licensees themselves. In a leading case, the Commission's powers over program content were attacked and upheld with reference solely to the licensees' right of immunity from governmental interference with their "speech." The scarcity of broadcast frequencies was said to justify some regulation trenching on the broadcasters' First Amendment interests. *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943). These cases mark a new effort by members of the public to assert *their* First Amendment interests in the operations of radio and television.

There is scant precedent for such an effort. Indeed, the few previous attempts by individuals or groups to enforce their First Amendment interests in court have failed. In each case, the litigants have run up against not only an unreceptiveness to their constitutional theory, but also a crabbed judicial view of "state action"—a view that the "[First] Amendment limits only the action of Congress or of agencies of the federal government and not private corporations such as [broadcast licensees]." *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 1 Cir., 183 F.2d 497, 501 (1950); *McIntire* v. *Wm. Penn Broadcasting Co. of Philadelphia*, 3 Cir., 151 F.2d 597, 601 (1945). *See also Post* v. *Payton*, *E.D. N.Y.*, 323 F. Supp. 799 (1971).

We believe the path is now clear of such doctrinal impedimenta. Perhaps the most important recent develop-

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[10] *See, e.g., United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948). Congress itself has prohibited any interference by the Commission with "the right of free speech by means of radio communication." 47 U.S.C. § 326 (1964).

ment is the Supreme Court's seminal decision in *Red Lion Broadcasting Co., supra.* There the Court upheld another aspect of the Commission's regulation of program content —the fairness doctrine's personal attack and campaign editorial rules. However, the Court's opinion went well beyond the scarcity rationale of the *National Broadcasting Co.* case. It justified the Commission's interference with broadcasters' free speech by invoking specifically constitutional rights of the general public which, it said, underlie and support the fairness doctrine rules at issue. Issuing what must become a clarion call for a new public concern and activism regarding the broadcast media, the Court stated that "the people as a whole retain their * * * collective right to have the medium function consistently with the ends and purposes of the First Amendment." [11] It went on to say:

> "* * * The right of free speech of a broadcaster * * * does not embrace a right to snuff out the free speech of others. * * *
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> * * * *
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> "* * * [A] licensee has no constitutional right * * * to monopolize a radio frequency to the exclusion of his fellow citizens. * * *
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> * * * *
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> "* * * It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. * * *" [12]

Of course, the *Red Lion* Court had to invoke the public's First Amendment interests for a narrow purpose only—to uphold legislative and administrative action already taken. It did not have to reach the issue, presented in these cases, of invoking those interests for a direct

[11] 395 U.S. at 390.

[12] *Id.* at 387, 389, 390.

attack on broadcasters' policies approved by the Commission. However, the language used by the Court is significantly expansive. It spoke of a First Amendment "right" held by "the people as a whole." A constitutional "right" is hardly deserving of the name if it can function only to *permit* legislative and administrative action and if its content depends entirely upon the current policies of the legislative and executive branches. The First Amendment, after all, contains nothing analogous to the fifth section of the Fourteenth Amendment, authorizing Congress to enforce constitutional interests unenforceable by the Courts.[13]

For many purposes, it is proper to consider broadcast licensees as "private" businesses. Yet, for purposes of the First Amendment, "[o]wnership does not always mean absolute dominion." *Marsh* v. *Alabama*, 326 U.S. 501, 506 (1946). "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans* v. *Newton*, 382 U.S. 296, 299 (1966). The *Red Lion* Court itself commented on the impermissibility of "private censorship" and cited old doctrine that "'[f]reedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.'"[14] The reach of the First Amendment, therefore, depends not upon "public"—"private" technicalities, but upon more functional

[13] On the effect of the specific language in the fifth section of the Fourteenth Amendment, *see Oregon* v. *Mitchell*, 400 U.S. 112 (1970); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). Of course, the Fourteenth Amendment does not apply to federal regulation of the broadcast industry, since no interference with the states is involved.

[14] 395 U.S. at 392, quoting *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

considerations. They are (1) the governmental involvement in or public character of a particular enterprise, and (2) the importance or suitability of that enterprise for the communication of ideas.[15]

The last few decades of court decisions expanding the concept of "state action" have focused on myriad indicia of governmental involvement and public character. Many of them are apparently applicable to the operations of the broadcast industry.[16] But we need stress only two more basic factors which, taken together, bring broadcast licensees well within the ambit of the First Amendment for the purposes of these cases. First, the general characteristics of the broadcast industry reveal an extraord-

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[15] Most "state action" cases, of course, have been concerned with equal protection rights under the Fourteenth Amendment rather than with free speech rights under the First Amendment. However, the principle of governmental involvement developed therein has been applied equally well in the First Amendment context. *See, e.g., Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451 (1952); *Farmer* v. *Moses*, S.D. N.Y., 232 F.Supp. 154 (1964). The principle of "public character" may be found in decisions dealing directly with application of First Amendment rights to "private" entities. *See., e.g., Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Tanner* v. *Lloyd Corp., D. Ore.*, 308 F.Supp. 128 (1970); *Diamond* v. *Bland*, 91 Cal. Rptr. 501, 477 P.2d 733 (1970). The importance and suitability of a particular place for the communication of ideas has been stressed in all of the cases cited above, as well as in all of the access-to-public forum cases, *see* Notes 40-43 *infra*.

[16] Dissenting in the BEM case now under review, Commissioner Johnson dealt exhaustively with the Supreme Court's state action doctrine, isolating eight separate indicia of "state action." He argued very strongly that all eight indicia apply to broadcast licensees. *Business Executives Move for Vietnam Peace, supra* Note 1, 25 F.C.C.2d at 253-264. Because this highly analytical—one might say mechanical—approach runs the risk of reading Supreme Court opinions for more than they mean, we have chosen to paint with a broader brush. Ours is the approach which the Supreme Court seems in fact to have used in the past.

inary relationship between the broadcasters and the federal government—a relationship which puts that industry in a class with few others.[17] It is one of "interdependence" and "joint participa[tion]." *See Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961). "[T]he [federal] regulatory system," it has been said, "is as much responsible for the existence of a broadcasting medium as the Bureau of Engraving is responsible for the existence of United States currency." [18] It has long been recognized that the airwaves are "a limited and valuable part of the public domain," [19] leased out temporarily by the federal government which retains ultimate control over them.[20] Federal agency review and

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[17] In particular, broadcasting may be easily distinguished from the newspaper industry in terms of "state action." In two recent decisions, courts have held that newspapers are not subject to the First Amendment. *Associates & Aldrich Co., Inc.* v. *Times Mirror Co.*, 9 Cir., 440 F.2d 133 (1971); *Chicago Joint Board* v. *Chicago Tribune Co.*, 7 Cir., —— F.2d ——, 39 U.S. L. WEEK 2360 (December 17, 1970). While the governmental involvement in and public character of newspapers in surely less than that of broadcasting, we of course need express neither agreement nor disagreement with the cited decisions here.

[18] Pemberton, *The Right of Access to Mass Media*, in N. DORSEN (ed.), THE RIGHTS OF AMERICANS 277, 290 (1971). The Government is also directly responsible for the very existence of particular broadcasters. "[E]xisting broadcasters have often attained their present position because of their initial government selection in competition with orders * * *. * * * [Their present] advantages are the fruit of a preferred position conferred by the Government." *Red Lion Broadcasting Co.* v. *F.C.C.*, *supra* Note 7, 395 U.S. at 400.

[19] *Office of Communication of United Church of Christ* v. *F.C.C.*, *supra* Note 8, 123 U.S.App.D.C. at 337, 359 F.2d at 1003.

[20] The licensing-out or delegation of governmental authority has been an element in some of the Supreme Court's most expansive state action decisions. *See Evans* v. *Newton*, 382 U.S. 296 (1966); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Smith* v. *Allwright*, 321 U.S. 649 (1944). The mere existence of a licensing or delegation relationship is not, of course, enough by

guidance of broadcasters' conduct is automatic, continuing and pervasive.[21] For broadcast licensees are considered the "proxies" or "fiduciaries" of the people.[22] Almost no other private business—almost no other regulated private business—is so intimately bound to government and to service to the commonwealth.

A second and even more important factor is the *specific* governmental involvement in the broadcasters' action now under review here. All of the cases in which previous courts have characterized broadcasters as mere "private corporations" immune from First Amendment constraints, *see* text at page [App. 456] *supra*, have involved direct suits against broadcast licensees. In the cases before us now, however, the Commission has given its imprimatur to the flat ban on editorial advertising. It specifically considered and specifically authorized the flat ban. Thus we are called upon to review not simply a private decision, but a decision by a government agency, a decision which must inevitably provide guidance for future broadcaster action.

There is ample authority for the principle that specific governmental approval of or acquiescence in challenged

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itself to establish state action; licensed pharmacists cannot be equated with licensed broadcasters. The actual extent of governmental involvement and the public character of the enterprise in question remain the final tests of state action.

[21] The activities of a governmental regulatory agency have also been emphasized in at least one of the Supreme Court's expansive state action decisions. *See Public Utilities Comm'n* v. *Pollak*, *supra* Note 15, 343 U.S. at 462, *citing American Communications Ass'n* v. *Douds*, 339 U.S. 382, 401 (1950) ("[W]hen authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself.").

[22] *See Red Lion Broadcasting Co.* v. *F.C.C.*, *supra* Note 7, 395 U.S. at 394, 396; *Office of Communication of United Church of Christ* v. *F.C.C.*, *supra* Note 8, 123 U.S.App.D.C. at 337, 359 F.2d at 1003.

action by a private organization indicates "state action."[23] Indeed, in a case similar to ours the Supreme Court held that a private bus company franchised by the federal government and regulated by the District of Columbia Public Utilities Commission could be subject to First Amendment constraints. It emphasized the specific regulatory acquiescence in the challenged action of the bus company:

> "* * * In finding [state action] we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. We do, however, recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. We rely particularly upon the fact that that agency, pursuant to protests against the [challenged action], ordered an investigation of it and, after formal public hearing, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby. * * *"

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[23] The Supreme Court has said that "action of state courts and judicial officers in their official capacities is to be regarded as action of the State * * *." *Shelley* v. *Kraemer*, 334 U.S. 1, 14 (1948). *See New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 DUKE L. J. 219, 227-230. *See also* this court's discussion of the *Shelley* principle—which surely must apply to actions of a federal administrative agency specifically approving private action—in *Edwards* v. *Habib*, 130 U.S.App.D.C. 126, 397 F.2d 687 (1968). Specific governmental acquiescence, as well as specific approval, has also been a focus of Supreme Court state action decisions. *See Marsh* v. *Alabama*, *supra* Note 15, 326 U.S. at 507 & n.4, 509; *Burton* v. *Wilmington Parking Authority*, *supra* Note 20, 365 U.S. at 725.

Public Utilities Commission v. *Pollak*, 343 U.S. 451, 462 (1952). (Footnote omitted.)

Broadcasting's importance and suitability for communication of ideas need not be labored. Mere presence of large and appropriate audiences (and thus opportunities for effective communication) has sometimes been emphasized by the courts to show the relevance of First Amendment protections.[24] In *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), for example, the Supreme Court held that a privately owned shopping center was an appropriate place for the "speech" of labor union picketers. It stressed "[t]he large-scale movement of the country's population from the cities to the suburbs [that] has been accompanied by the advent of the suburban shopping center * * *." *Id.* at 324. With this demographic change, the "speech" that once took place on the public streets around downtown shopping areas must be allowed to move to privately owned parking areas in the suburbs, for that is where the relevant audiences now are. The technological and cultural changes connected to the current preeminence of the broadcast media as our primary means of communication are no less striking. The soap box orator and the leafleter are becoming almost obsolescent; their Saturday afternoon audiences have increasingly moved indoors—in front of their television sets.[25]

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[24] *See, e.g., Wolin* v. *Port of New York Authority*, 2 Cir., 392 F.2d 83, 90-91 (1968) ("The propriety of a place for use as a public forum * * * [may be established if] the place is where the relevant audience may be found."). Of course, the cases before us involve the right to speak on a *medium* of communication, not in a particular *place*. Thus many of the considerations are different; but the basic concern with the ability to reach the relevant audience applies in both situations.

[25] The Supreme Court has noted that broadcast "technology * * * supplants atomized, relatively informal communication with mass

Moreover, unlike most of the private entities held to be subject to First Amendment constraints, the broadcast media are specifically dedicated to communication. They function as both our foremost forum for public speech and our most important educator of an informed people. In a populous democracy, the only means of truly mass communication must play an absolutely crucial role in the processes of self-government and free expression, so central to the First Amendment. That can be said of almost no other "private" enterprise.

IV

Broadcast licensees, then, serve not only as "speakers" but also as administrators of a highly valuable communications resource, subject to First Amendment constraints. Their dual role demands that their own constitutional interests in free speech coexist with those of the general public. But what are the dimensions of the public's First Amendment interests in the operation of radio and television? And how do they apply to the issue of editorial advertising?

It is particularly important that these cases deal only with the public's First Amendment interests in broadcasters' allocation of advertising time. They deal only with time relinquished by broadcasters to others; petitioners argue only that, in relinquishing that time, broadcasters must not discriminate against protected expression. In normal programming time, closely controlled and edited by broadcasters, the constellation of constitutional interests would be substantially different. In news and documentary presentations, for example, the broadcasters'

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media as a prime source of national cohesion and news * * *." *Red Lion Broadcasting Co.* v. *F.C.C.*, *supra* Note 7, 395 U.S. at 386 n.15.

own interests in free speech are very, very strong.[26] The Commission's fairness doctrine properly leaves licensees broad leeway for professional judgment in that area. But in the allocation of advertising time, the broadcasters have no such strong First Amendment interests. *Their* speech is not at issue; rather, all that is at issue is their decision as to which other parties will be given an opportunity to speak.

Though the broadcasters themselves have no substantial First Amendment interest in the allocation of advertising time, we might expect that the interest of members of the public—potential advertisers—would be quite strong. However, the Commission and the broadcaster-intervenors have argued just the opposite. They contend that the public's constitutional concerns do not extend to advertising time. Thus we must decide whether the substantial block of the broadcast day devoted to advertising is but a vacuum, devoid of First Amendment constraints, in the midst of a medium powerfully affected by those constraints—a desert in the midst of an oasis.

The Commission and intervenors work from the following premise. They define the public's overall constitutional interests in the operations of radio and television quite narrowly. The public's only interest, they suggest, is as viewers and listeners—not as speakers. They cite to us the *Red Lion* Court's mention of "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences" over the broadcast media.[27] And they read that statement to set forth not only *an* interest of the public, but the *only* interest of the public.

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[26] *See id.* at 396.

[27] *Id.* at 390.

Working from that premise, the Commission and intervenors contend that the public already receives "suitable access" to controversial views on normal programming time. Application of the fairness doctrine's requirement of full and fair coverage of public issues in non-advertising time, they suggest, ensures that all views on these issues will in fact be presented. They assume that editorial advertising adds nothing new to the debate. The fairness guarantee alone, they say, is enough to eliminate petitioners' claim on advertising time—and enough to satisfy the First Amendment. We disagree.

Surely the public's interest in free access to the full spectrum of ideas and controversial views on radio and television is highly important. The right to receive ideas and information is deeply rooted in First Amendment law.[28] The *Red Lion* Court stressed that right, since it was the one primarily relevant to the fairness doctrine rules at issue in the case. But we do not believe that the *Red Lion* decision makes the goal of an informed public the exclusive First Amendment interest constraining broadcasters. Certainly the Supreme Court has done so in no other context.

The public has a First Amendment interest in the mode or manner—as well as the content—of public debate aired on the broadcast media. The *Red Lion* Court itself stated specifically that "[i]t is the purpose of the First Amendment to preserve an *uninhibited* marketplace of ideas [in the broadcast media]." [29] This court, simi-

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[28] *See Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); *Lamont* v. *Postmaster General*, 381 U.S. 301, 307-308 (1965) (Mr. Justice Brennan, concurring); *Martin* v. *City of Struthers*, 319 U.S. 141, 143 (1943). The "right to receive," however, has not been considered the central First Amendment interest, and never the only First Amendment interest.

[29] 395 U.S. at 390. (Emphasis added.)

larly, has said that the Commission is obliged to administer the airwaves "in such a manner that * * * debate on public issues is 'uninhibited, robust and wide-open.'" *National Ass'n of Theatre Owners* v. *F.C.C.*, 136 U.S. App.D.C. 352, 365, 420 F.2d 194, 207 (1969). The reference to "uninhibited" debate is, of course, borrowed from the Supreme Court's decision in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). The Court there extended First Amendment protection to some forms of libel on public officials. It made clear that the Amendment's concern extends beyond the mere fostering of speech whose content will properly inform the public. The *New York Times* decision establishes a strong First Amendment interest in vigorous, "wide-open" public debate.

Furthermore, we must take note of a third—but, perhaps, most important—First Amendment interest. That is the interest of individuals and groups in effective self-expression. The *Red Lion* Court did say that "it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." [30] For, as it pointed out, broadcast time is necessarily limited. But the limited nature of broadcast time does not dictate that the individual and group interest in self-expression be brushed aside entirely; it allows for a reasonably regulated, "abridgeable" right to speak. The First Amendment values of individual self-fulfillment through expression and individual participation in public debate have long been recognized.[31] We all have an interest in speaking up ourselves as well as in hearing others. It is too late to argue that the First Amendment protects ideas but not an in-

[30] *Id.* at 388.

[31] *See, e.g.*, T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4-7 (Vintage ed. 1967).

dividual's interest in expressing them and doing so in his own way.

We conclude, then, that the public's First Amendment interests constrain broadcasters not only to provide the full spectrum of viewpoints, but also to present them in an uninhibited, wide-open fashion and to provide opportunity for individual self-expression.[32] How do these three First Amendment interests relate to a more specific interest in the airing of editorial advertisements? The answer emerges when we understand the special importance of advertising time to our system of free expression. First, the initial decision to produce an editorial advertisement is in the hands of members of the public. The initiative to present a particular view does not have to come from a member of the broadcaster's staff. Second, a paid advertisement is basically controlled and edited by the advertiser. He is allowed to present his views in a fashion chosen by himself. If an individual is interviewed for a news program, he may expect his comments to be abbreviated and edited; reporters' commentary will qualify what he has to say. For it is the broadcasters' responsibility to be objective, to condense issues into available time for presentation, and to play up or play down views according to the *broadcaster's* opinion of what is important and interesting. But when an individual or group buys time to say its piece, the crucial controls are in its own hands. Editorial advertising is thus a special and

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[32] Of course, all three of these interests apply to non-advertising time as well as to advertising time. The Commission, in fact, has encouraged broadcasters to present conflicting views through partisan voices as well as through predigested commentary. *See Democratic National Committee, supra* Note 1, 25 F.C.C.2d at 222-223. However, as we make clear in text, the selective, edited presentation by the Government's licensee of partisan voices on news shows, for example, does not erase the *special* advantages of allowing self-selected partisan voices on advertising time.

separate mode of expression, not simply a duplication of other expression on the same medium.[33]

The importance of initiative and control to the First Amendment interests in wide-open debate and individual self-expression should be obvious. Vigorous, free expression is promoted when members of the public have *some* opportunity to take the initiative and editorial control into their own hands on the broadcast media. It has traditionally been thought that the best judge of the importance of a particular viewpoint or issue is the individual or group holding the viewpoint and wishing to communicate it to others. In the First Amendment area, our best guarantee has always been a "free market" in which partisans who feel strongly on particular issues may decide on their own to speak out and to speak out in their own way. The present system, allowing a flat ban on editorial advertising, conforms instead to a paternalistic structure in which licensees and bureaucrats decide what issues are "important," how "fully" to cover them, and the format, time and style of the coverage.

Even if broadcasters were to succeed in presenting a full spectrum of viewpoints and partisan spokesmen on non-advertising time, their retention of *total* initiative and editorial control is inimical to the First Amendment. The importance of fair, objective and full treatment of controversial issues on normal programming cannot be doubted. But, as the Supreme Court has said in the context of classroom debate, "supervised and ordained discussion" is not enough. *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969). "The Nation's future depends upon leaders trained through wide ex-

[33] *See* text at pages [Apps. 471-72] & Note 37 *infra*. See also Note, *A Fair Break for Controversial Speakers: Limitations of the Fairness Doctrine and the Need for Individual Access*, 39 GEO. WASH. L. REV. 532, 557-560 (1971).

posure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967). In other words, there is always a strong First Amendment interest in opening up channels for more spontaneous, self-initiated, self-controlled expression.[34]

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[34] We are cognizant of current proposals to reform the Commission's fairness doctrine and invigorate its enforcement, so lackluster in the past. We commend the Commission's consideration of new rules to "encourage and implement" presentation of opposing viewpoints by reemphasizing the obligation to "seek out" controversial issues. *Obligations of Broadcast Licensee Under the Fairness Doctrine*, 35 FED. REG. 7820 (1970). But, as the Commission says, the proposed rules would be but a "modest * * * step in promoting access to the media." *Id.* at 7821. They go little beyond the present obligation to give "full" coverage to controversial issues. Such an obligation is inherently difficult to define and enforce. At best, the Commission can evaluate only the *general* willingness of a licensee to "seek out" issues and glaring examples of noncoverage of obviously important issues. The Commission cannot be expected to engage licensees in fine debates over coverage of less obviously life-or-death issues. But the fundamental point—the point we emphasize—is that no matter how "fully" controversial issues might be covered in a perfect broadcasting world, the basic initiative and control remains with the licensee. Because there is not even a partial "free market" opening to the public at large, the crucial First Amendment interests in decentralized iniative and control go unsatisfied.

We realize that there is another possible, but purely speculative, reformation of the fairness doctrine now under consideration which might be supposed to obviate the need for a measure of "free market" access to advertising time. It has been proposed that licensees be required to provide self-edited advertising time to groups or individuals under the fairness doctrine only when a commercial advertiser has already taken a controversial position in his broadcast messages. Such an approach has been taken regarding cigarette advertisements, though that case was said to be extraordinary and not to establish a general precedent. *Banzhaf* v. *F.C.C.*, 132 U.S.App.D.C. 14, 405 F.2d 1082 (1968). But even if that principle were made to apply generally, it would leave the initiative solely in the hands of commercial advertisers: the only issues on which noncommercial groups and individuals could speak through

Even in terms of the public's First Amendment interest emphasized by the Commission and intervenors—the interest of "viewers and listeners" in passive access to the full spectrum of viewpoints on radio and television—editorial advertising plays an important role. The concept of "full" coverage of "controversial" issues "of public importance" is vague to say the least, and leaves much to the broadcasters' discretion (and possible oversight).[35] Assuming that broadcasters are sometimes fallible, the goal of a fully informed public is best attained by opening of outlets for members of the public to supplement the licensees' assessments of "importance," "controversiality" and "full" coverage. The Commission's and intervenors' argument might be somewhat stronger if it were designed to support a partial ban on editorial advertising concerning issues and views which have *in fact* been substantially aired on normal programming time.[36] The argument is unconvincing, however, in support of a flat, *per se* ban on any and all editorial advertisements.

Moreover, even if "antiwar views," for example, have in fact been presented on news and interview shows, it

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editorial advertisements would be those issues which commercial advertisers had already chosen to raise themselves. Allowing such a narrow group, motivated largely by business profit, to set the agenda for editorial advertising is unconscionable and contrary to First Amendment precepts. It is crucial that noncommercial groups and individuals have the same rights of initiative as commercial advertisers.

[35] The guarantees of full and fair coverage have proved particularly difficult to define and enforce in the past. They have taken on effective meaning only in the most extreme cases of broadcaster irresponsibility. For a depressing critique of the Commission's apparent inability to enforce its own standards, *see* Cox & Johnson, *Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study*, 14 F.C.C.2d 1 (1968).

[36] Even then, however, the special attributes of editorial advertising would not be eliminated by the broadcaster's own coverage. *See* text at pages [Apps. 467-70] *supra* & pages [Apps. 471-72] *infra*.

is not *necessarily* clear that a particular antiwar editorial advertisement would add nothing to the public's information and understanding. "Viewpoints" cannot be so neatly and infallibly catalogued as the Commission would have us believe. Self-expression and public debate are much more subtle phenomena; matters of style and intensity of feeling are important components.[37] Again, an across-the-board ban on editorial advertisements—leaving the quality of public debate in the control of one licensee, supplemented by no other autonomous inputs—may well ignore opportunities to enliven and enrich the public's overall information.

We recognize, of course, that the onesidedness and private editing of particular "spot" editorial advertisements may in the end steer viewers and listeners away from the "truth" by distorting complex issues. Being brief, these "spot" messages—no less than normal broadcast news coverage—may not canvass all possible arguments or develop all possible implications of the position they espouse. But that does not mean that they are unprotected by the First Amendment. Our Constitution protects many forms of misleading and overly simplified

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[37] In *Lee* v. *Board of Regents of State Colleges, W.D. Wis.*, 306 F.Supp. 1097 (1969), *affirmed*, 7 Cir., 441 F.2d 1257 (1971), the court held that a school newspaper was obliged under the First Amendment to print antiwar editorial advertising, even though antiwar views could be printed in the newspaper's news and letters-to-the-editor columns. The court stressed the qualitative—and valuable—difference in expression of views through an editorial advertisement. "It is readily apparent," it said, "that a paid advertisement can be cast in such a form as to command much greater attention than a letter to the editor. Large type, photographs, repeated publication and full pages of space are some of the modes of expression available in an editorial advertisement that might not be available in a letter to the editor." *Id.* at 1101. Another court has come to the same result in a newspaper editorial advertising case. *Zucker* v. *Panitz*, S.D. N.Y., 299 F.Supp 102 (1969). *See* text at pages [Apps. 474-75] *infra.*

political expression in order to ensure robust, wide-open debate. "[N]either factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct * * *." *New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 273. Nor does the brevity of the criticism. We must, then, be very, very slow to judge any sort of speech on public issues worthless. The marketplace of ideas protected by the First Amendment, after all, is not governed by the tastes and intellectual standards of the universities or the broadcast newsroom —or even of judicial chambers.

We conclude, therefore, that the fairness doctrine's goal of full and fair coverage of issues on normal programming time does not eliminate the public's interest in a further, complementary airing of controversial views during advertising time. We must concur in the Supreme Court's only recorded comments on constitutional protection for editorial advertising—comments made in the context of newspapers, like broadcasting a medium which may be expected, if not required, to present the various sides of public issues in its non-advertising space. The Court said that editorial advertisements, unlike commercial advertisements,[38] are of fundamental First Amendment concern, since they deal with political questions. And it protected them from libel law attack to the same extent as the newspapers' own editorial columns, for

> "[a]ny other conclusion * * * might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have

[38] Commercial advertising—indeed, any sort of commercial speech —is less fully protected than other speech, because it generally does not communicate ideas and thus is not directly related to the central purpose of the First Amendment. *See Breard* v. *City of Alexandria,* 341 U.S. 622 (1951); *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942).

> access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. * * * The effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.' * * *"

New York Times Co. v. *Sullivan, supra,* 376 U.S. at 266.

V

We come now to the aspect of the broadcasters' policy which, petitioners say, trenches on the First Amendment interest in editorial advertising. The constitutional defect of that policy is somewhat ironic. The *New York Times* Court made clear that the fact distinguishing fully protected editorial advertising from less fully protected commercial advertising is that the former deals with controversial public issues. Indeed, the political nature of editorial advertising places it near the core of the First Amendment. However, the very characteristic which affords it strict constitutional protection is also the characteristic causing the broadcasters' challenged policy to single it out and exclude it from the airwaves. That, we believe, is the crucial aspect of these cases.

It is important to note that petitioners do not attack the exclusion of editorial advertising by broadcasters who accept no advertisements whatever.[39] We do not have to

[39] DNC's position is somewhat ambiguous. The ruling which it requested from the Commission would, by its terms, apply to all broadcasters, whether or not they accept any advertising. *See* text at page [App. 451] *supra.* However, on appeal DNC's arguments have been focused entirely on broadcasters who do already accept noncontroversial advertising. The interests of particular licensees in keeping all advertising off the air were not explored before the Commission or before this court—for example, an all music station may have a very substantial interest in broadcasting no paid announcements. Because the special issues relating to such licensees were not presented here, we do not decide them.

decide whether the broadcast medium inherently amounts to a "public forum" on the order of public streets or parks or meeting halls or even bus terminals.[40] We leave open the possibility that broadcasters may constitutionally relinquish no time at all for advertising of any sort. For the issue in these cases is the permissibility of discrimination, within a given block of advertising time, against "controversial" speech and in favor of commercial and "noncontroversial" speech. We deal here with a forum that already has been opened up by the licensees themselves, opened up for direct broadcast presentations by members of the public.

Fortunately, we do not write on a clean slate in this area. Six courts have confronted discriminations among types of speech like the one challenged here. Every one of them—four federal courts and two state supreme courts—has held that once a forum, subject to First Amendment constraints, has been opened up for commercial and "noncontroversial" advertising, a ban on "controversial" editorial advertising is unconstitutional unless clearly justified by a "clear and present danger." *Lee* v. *Board of Regents of State Colleges*, W.D. Wis., 306 F. Supp. 1097 (1969), *affirmed*, 7 Cir., 441 F.2d 1257 (1971); *Zucker* v. *Panitz*, S.D. N.Y., 299 F.Supp. 102 (1969); *Kissinger* v. *New York City Transit Authority*, S.D. N.Y., 274 F.Supp. 438 (1967); *Hillside Community Church, Inc.* v. *City of Tacoma, Wash.*, 455 P.2d 350 (1969); *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal.Rptr 430, 434 P.2d 982 (1967). We join this unbroken line of authority.

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[40] *See, e.g., Schneider* v. *State*, 308 U.S. 147 (1939); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *Wolin* v. *Port of New York Authority*, *supra* Note 24. *See generally* Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 SUP. CT. REV. 1.

First Amendment doctrine governing access to forums for communication has been elaborated often in recent years. The essential test is an exercise in balancing, though weighted in favor of First Amendment values.[41] On one hand, the court must assess the constitutionally protected interest in the particular expressive activity in the particular forum. On the other hand, it must assess the importance of other uses of the forum which may be threatened and the extent to which they actually will be disrupted. Access may be denied only if the disruption caused by a particular type of expression (*e.g.*, public speaking, marching, picketing) clearly overrides the "preferred" interest in free speech. Thus there is some right of access by demonstrators to state capitol grounds [42] but not to a jailyard.[43]

Ordinarily, courts have to make the basic balancing judgment on their own. However, when the administrator of a forum has determined to grant access to some speakers or some picketers, he has implicitly made that basic judgment himself. When some public speaking is allowed in a park, the park's administrator has determined that the normal and proper functions of the park will not be excessively harmed by public speaking. If he then attempts to deny access to other public speakers

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[41] Most of the cases, other than those cited above in text, have involved access to particular places in order to perform expressive activities such as speaking, leafleting, or demonstrating in some fashion. For general discussions of the cases and the principles applied, *see* H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT (paper ed. 1965); Note, *Regulation of Demonstrations*, 80 HARV. L. REV. 1773 (1967). There is no reason why the general principles applied in cases involving access to *places* should not apply to our cases involving access to a particular *medium* of expression. *See* Note 24 *supra*.

[42] *Cox* v. *Louisiana*, 379 U.S. 536 (1965).

[43] *Adderley* v. *Florida*, 385 U.S. 39 (1966).

he cannot be heard to claim the opposite. The burden is on him to show some very substantial factor distinguishing the disruption that would cause from that caused by the speaking or picketing already allowed.

The same principle applies to broadcasters who have opened their forum to commercial speech but would close it to controversial political speech. By opening up a forum for some paid presentations, independently edited and controlled by members of the public, the broadcasters have waived any argument that advertising is inherently disruptive of the proper function of their stations. The exclusion of only one sort of advertising—which we have shown to have great First Amendment value—is then highly suspect, a *prima facie* constitutional violation. To justify the exclusion, there must be a substantial factor distinguishing the disruptive effect of editorial advertising from that of commercial advertising.

The content of the idea which the excluded speakers seek to promote is—emphatically—*not* permitted as a distinguishing factor in itself. Indeed, the existence of an exclusionary discrimination apparently based on the content of ideas presents an additional, or greatly heightened, *prima facie* constitutional violation. Both free speech and equal protection principles condemn any discrimination among speakers which is based on what they intend to say.[44] If the First Amendment prohibits anything at all, it must be a censorial discrimination among ideas. And since First Amendment rights have been held to be "fundamental rights" triggering the strict standard

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[44] For discussions of the First Amendment-equal protection intersection, *see* Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1482, 1492-1497 (1970); Kalven, *supra* Note 40, 1965 SUP. CT. REV. at 29-30; Van Alstyne, *Political Speakers at Universities: Some Constitutional Considerations*, 111 U. PA. L. REV. 328, 337-339 (1963).

of review under equal protection principles, *Williams* v. *Rhodes*, 393 U.S. 23, 30-31 (1968), it is doubly clear that the burden of justifying any apparent discrimination is very great indeed.

At least 20 years ago, the Supreme Court began condemning discriminations among different exercises of the same type of expression. *Fowler* v. *Rhode Island*, 354 U.S. 67 (1953); *Niemotko* v. *Maryland*, 340 U.S. 268, 272-273 (1951). Both cases involved access to a forum already opened to others. More recently, the Court in *Cox* v. *Louisiana*, 379 U.S. 536 (1965), invalidated a state regulation that permitted labor picketing but not civil rights picketing. In his concurrence, Mr. Justice Black stated that this sort of discrimination is "censorship in a most odious form" and violates both the First Amendment and the equal protection clause. *Id.* at 581. Similarly, in *Adderley* v. *Florida*, 385 U.S. 39 (1966), the Court upheld a ban on demonstrations in a jailyard, but was careful to note that "[t]here is not a shred of evidence in this record * * * [the demonstrators were excluded] because the sheriff objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest." *Id.* at 47.

No doubt a discrimination against all controversial speech—such as we face in these cases—is somewhat less "odious" than a discrimination among different controversial viewpoints on particular issues. But it is a form of censorship just the same.[45] It is a favoritism toward

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[45] In *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Rptr 430, 434 P.2d 982, 986 (1967), the California Supreme Court came to the same conclusion as we do on this issue, saying:

> "* * * The vice is not that the district has preferred one point of view over another, but that it chooses between classes of ideas entitled to constitutional protection, sanctioning the expression of only those selected, and banning others. Thus

the *status quo* and public apathy and, in these cases, a favoritism toward bland commercialism.[46] Such favoritism flies in the face of the First Amendment, whose central purpose is to protect and promote controversy, "uninhibited, robust and wide-open," on public issues.

Moreover, it is by no means clear that a broadcasters' ban on "controversial" advertising does not impermissibly open the door to a *sub rosa* discrimination *among* controversial ideas. The term "controversial" is extraordinarily vague. Some advertisements may not be deemed "controversial"—and may not even be "controversial" for purposes of the fairness doctrine[47]—but may still express ideas, the negative of which would surely be labeled "controversial."[48] Ads for Radio Free Europe or Army re-

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the district's regulation exercises a most pervasive form of censorship.

"* * * [T]he district's policy * * * affords total freedom of the forum to merchantile messages while banning the vast majority of opinions and beliefs extant which enjoy First Amendment protection because of their noncommercialism. No statistical data is required to demonstrate that in the totality of man's communicable knowledge, that which bears no relationship to material value preponderates."

The Supreme Court of Washington specifically adopted this view in *Hillside Community Church, Inc.* v. *City of Tacoma*, Wash., 455 P.2d 350, 353 (1969).

[46] Commissioner Johnson commented in his dissent that broadcasters "have created a system in which immediate access is granted to one, privileged class of applicants: the commercial peddler of goods and services. * * * We have an individual right of access, all right, but only for hucksters of industrial garbage." *Democratic National Committee, supra* Note 1, 25 F.C.C.2d at 233.

[47] *See Banzhaf* v. *F.C.C.*, 132 U.S.App.D.C. 14, 405 F.2d 1082 (1968); *Green* v. *FCC.*, —— U.S.App.D.C. ——, —— F.2d —— (Nos. 2470 & 24516, decided June 18, 1971).

[48] In *Wirta* v. *Alameda-Contra Costa Transit District, supra* Note 45, 434 P.2d at 987, the California Supreme Court made the same point very forcefully, and provided several telling examples:

[Footnote continued on page 480]

cruiting, for example, may be allowed unanswered on the air, while ads calling the notion of the "free world" a sham or ads calling the Army a threat to democracy would be banned entirely. The line between ideological and nonideological presentations is an almost impossible one to draw. All too often in our society one particular ideology—that of passivity, acceptance of things as they are, and exhaltation of commercial values—is simply taken for granted, assumed to be a nonideology, and allowed to choke out all the rest.[49]

Thus the editorial advertising ban, particularly when licensees accept advertising generally, establishes an unmistakable infringing of First Amendment liberties. The Commission and the broadcasters, then, bear a very heavy burden of justification. Whether we require a "compelling" justification, an "overriding" justification, or a "clear and present danger" is relatively unimportant.

VI

It being established that there is a strong and specific First Amendment interest in editorial advertising and that the policies discriminatorily barring such expression work a *prima facie* violation of constitutional principles, we must consider the countervailing considerations raised by the Commission and the broadcaster-intervenors. In

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[48] [Continued]

> "* * * A lumber company may advertise its wood products, but a conservation group cannot implore citizens to write to the President or Governor about protecting our natural resources. An oil refinery may advertise its products, but a citizens' organization cannot demand enforcement of existing air pollution statutes. An insurance company may announce its available policies, but a senior citizens' club cannot plead for legislation to improve our social security program."

[49] *See generally* C. WAXMAN (ed.), THE END OF IDEOLOGY DEBATE (1969).

order to justify the policy at issue, they must show some very substantial harm that would be caused by acceptance of editorial advertising—a sort of harm great enough to override the First Amendment interests at stake and a sort of harm not already involved in the acceptance of commercial and "noncontroversial" advertising. Only such a showing could convince us that the ban on editorial advertisements is supported by sufficient countervailing values and is not based solely on the content of the ideas conveyed.

The Commission and intervenors have begun from the assumption that our holding for petitioners would deprive broadcast licensees of their highly prized editorial independence and control over their frequencies, giving editorial advertisers a *right* to air time which commercial advertisers do not presently have. They have argued that petitioners seek the right to "grab the mike" from broadcasters' hands.[50] The result, they say, would be a threefold disaster. First, they foresee " 'a return to the chaotic situation of radio's early days' " [51] when too many hands grabbing for too few mikes made successful broadcasting impossible. Second, they argue that compulsory acceptance of editorial advertising would allow a few rich individuals or groups to buy up great blocks of time to purvey views on only one side of important issues, thus grossly unbalancing the broadcast station's treatment of those issues. And third, they point out that broadcasters compelled to accept editorial advertisements on one side of an issue would then be required by the fairness doctrine to accept at least some advertisements on the other side —free of charge if necessary. Provision of such free ad-

[50] Statement of attorney for intervenor Columbia Broadcasting System at oral argument before this court.

[51] Brief for the Commission in Case No. 24,537 at p. 12.

vertising time, they say, would cut into the broadcasters' revenues and might bring financial collapse.

The arguments of the Commission and intervenors fall well short of the mark. The reason is that they have apparently misunderstood the narrowness of the issue here. All that we are considering is the permissibility of a total, flat ban on editorial advertising. All petitioners ask is that broadcasters be required to accept *some* editorial advertising. They do not advocate an absolute right to air their advertisements. As the *Red Lion Court* made clear, there could not be any such absolute right because advertising time, like all broadcast time, is severely limited. *See* text at page [App. 467] *supra*. Under the Communications Act, broadcasters are not "common carriers" obliged to accept any advertising message that is submitted.[52] And petitioners do not argue that they should be. What petitioners do argue is that editorial advertisements should at least be considered and that some should be aired.

Such a modest reform would not substantially undermine broadcasters' editorial control over their frequencies. For broadcasters would retain full latitude to control the content of their programming. Their editorial control over non-advertising time would not be disturbed

[52] 47 U.S.C. § 153(h) (1964). The Commission and intervenors argue that this "common carrier" provision would be declared unconstitutional if we were to decide for petitioners in these cases. That, of course, is absolutely incorrect. The Commission and intervenors also point to a part of the Communications Act providing that if a station permits one candidate for office to use its facilities, it must then permit others equal time, but providing also that "[n]o obligation is imposed upon any licensee to allow the use of its station by any such candidate." 47 U.S.C. § 315(a) (1964). This statutory provision squares perfectly with our holding that a broadcaster is not necessarily obliged to provide any time for advertisements, but that if he does sell some advertising time he may not totally exclude editorial advertising.

whatever. All that would be affected is their allocation of advertising time—an area in which *editorial* control over content has never been of major importance. The interest in deciding which advertisements to accept is not as great as in deciding what public issues to cover and how to cover them on news presentations, for example. *See* text at page[s] [Apps. 464-65], *supra*. It surely cannot be equated, as the Commission and intervenors suggest, with the interest of law review editors in deciding what articles to publish. *See Avins* v. *Rutgers, State University of New Jersey*, 3 Cir., 385 F.2d 151 (1967), *cert. denied*, 390 U.S. 920 (1968). A broadcaster traditionally is not nearly as involved in the preparation and editing of advertisements as a law review staff is in the preparation and editing of articles.

Within the affected block of advertising time, neither chaos nor anything approaching chaos would follow the modest reform at issue. For, again, broadcasters would retain wide-ranging control. It is well established in First Amendment law governing access to forums that "reasonable regulations" may be promulgated and enforced to limit the exercise of free speech.[53] At the least, there may be regulations determining the time, place and manner of speech. They may not be used to stifle speech, but they are absolutely necessary to see that too many groups speaking at once do not drown out one another or trench overly much on the normal uses to which the forum is put by the public in general. The same principle applies to broadcasters' methods for allocating advertising time. All that petitioners condemn here are regulations providing that public issue advertising may be aired "at no time, in no place and in no manner" over the broadcast media.

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[53] *See, e.g., Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 320 (1968); Note, *supra* Note 15.

Clearly, for example, broadcasters are entitled to place an outside limit on the total amount of editorial advertising they will sell. To fail to impose some such limit would be to deny the public the other sorts of programming which it legitimately expects on radio and television. Similarly, "reasonable regulation" of the placement of advertisements is altogether proper. No advertiser has a right to air his presentation at any particular point in an evening's programming. Nor does he have a right to clog a particular time segment with his messages. A relegation of all editorial advertising to non-"prime time" or any other major discrimination in the placement of editorial advertisements would no doubt go too far. But there is still room for broad exercise of the broadcasters' discretion.

We need not define the precise control which broadcasters may exercise over editorial advertising. Rather, the point is that by requiring that *some* such advertising be accepted, we leave the Commission and licensees broad latitude to develop "reasonable regulations" which will avoid any possibility of chaos and confusion. The spectre of chaos and "mike grabbing" raised by the Commission and intervenors here is, as petitioners say, a "bogus issue." Broadcasters, after all, have dealt quite successfully with the scheduling problems involved with commercial advertising. We require only that noncommercial advertisers be treated in the same evenhanded way. Although many broadcasters already do allow editorial advertisements on the air, we have not been shown one reason, drawn from their experience, to suggest that chaos has resulted.

Beyond the mistaken suggestion of administrative apocalypse, the Commission and intervenors have raised a more plausible and important claim, involving the danger that a few individuals or groups might come to domi-

nate editorial advertising time. Of course, the mere fact that wealthy people may use their opportunities to speak more effectively than other people is not enough to justify eliminating those opportunities entirely. It takes more money to operate a magazine or newspaper—or, for that matter, a broadcast station—than to buy a segment of time for an editorial advertisement. Yet we are not reluctant to provide strict First Amendment protection for the operators of magazines, newspapers and broadcast stations. The real problem, then, is not that editorial advertising will cost money, but that it may be dominated by only one group from one part of the political spectrum. A onesided flood of editorial advertisements could hardly be called the "robust, wide-open" debate which the people have a right to expect on radio and television.

Again, however, invalidation of a flat ban on edtiorial advertising does not close the door to "reasonable regulations" designed to prevent domination by a few groups or a few viewpoints. Within a general regime of accepting *some* editorial advertisements, there is room for the Commission and licensees to develop such guidelines.[54] For example, there could be some outside limits on the amount of advertising time that would be sold to one group or to representatives of one particular narrow viewpoint. The licensee should not begin to exercise the same "authoritative selection" in editorial advertising which he exercises in normal programming. *See* text at pages [Apps. 469-70] *supra*. However, we are confident of the Commission's ability to set down guidelines which avoid that danger.

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[54] In the context of regulating demonstrations or picketing, guidelines which limit access because the same or similar groups had already had substantial access would be unusual and perhaps impermissible. However, the interest in maintaining some degree of balance on the broadcast media is particularly great. And "the characteristics of news media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co. v. F.C.C.*, *supra* Note 7, 395 U.S. at 386.

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We are no less confident of its ability to deal reasonably with the final problem it has raised—that relating to licensees' fairness obligations. Invalidation of a flat ban on editorial advertising, of course, leaves the Commission the power to require that if editorial advertisements are accepted on one side of an issue, then broadcasters must also accept at least some advertisements on the other side of the issue, free of charge if necessary. *See Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963). The result of such a reasonable regulation, however, need not be financial disaster. Indeed, it is incredible that the Commission would enforce a rule so rigid that licensees would be driven out of business.[55] If the obligation to provide some free time for answering editorial advertisements were shown to threaten actual financial harm to particular broadcasters, the Commission could make necessary adjustments.[56]

We conclude that none of the spectres raised by the Commission and intervenors—spectres of chaos, grossly unbalanced programming and financial disaster—is enough to justify a flat ban on editorial advertising. What real problems there are may be dealt with while the acceptance of *some* editorial advertisements is required. The keynote must be a scheme of reasonable regulation, administered by the licensee and guided by the Commission.

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[55] We note that the Commission's requirement of free time for antismoking was administered generously toward the financial concerns of licensees and, indeed, few broadcasters seem to have been deterred from accepting cigarette commercials as a result. *See National Broadcasting Co., Inc.*, 16 F.C.C.2d 947 (1969).

[56] *See* Note, *Fairness Doctrine: Television as a Marketplace of Ideas*, 45 N.Y.U. L. REV. 1222, 1249 (1970). We must be somewhat skeptical of the talk about financial disaster. For, according to Commissioner Johnson, television broadcasters at least "*average* a 90 to 100 percent return on tangible investment annually." N. JOHNSON, HOW TO TALK BACK TO YOUR TELEVISION SET 65 (1969). (Emphasis in original.)

At least in the past, the Commision has not considered this task so impossible. Twenty-five years ago it decided a case in which a union charged that a broadcaster was violating free speech rights by refusing to sell program time for the airing of controversial views. The Commission stated:

> "* * * The spirit of the Communications Act of 1934 requires radio to be an instrument of free speech, subject only to general statutory provisions imposing upon the licensee the responsibility of operating its station in the public interest. * * *
>
> "* * * No single or exact rule of thumb for providing time, on a non-discriminatory basis, can be stated for application to all situations which may raise in the operation of all stations. The Commission, however, is of the opinion that the operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues and that only charitable organizations and certain commercial interests may solicit memberships is inconsistent with the concept of public interest * * *. The Commission recognizes that good program balance may not permit the sale or donation of time to all who may seek it for such purposes and that difficult problems calling for careful judgment on the part of station management may be involved in deciding among applicants for time when all cannot be accommodated. However, competent management should be able to meet such problems in the public interest and with fairness to all concerned. The fact that it placed an arduous task on management should not be made a reason for evading the issue by a strict rule against the sale of time for any programs of the type mentioned."

United Broadcasting Co., 10 F.C.C. 515, 517-518 (1945). We agree with those views, and see no reason why the Commission and broadcast licensees should be any less

competent in 1971 than they were in 1945. Given a scheme of reasonable regulation, there is no reason why acceptance of editorial advertising should cause any substantial harm or disruption not already involved in the acceptance of other advertising. Therefore, to single out and exclude editorial advertising is to violate the First Amendment of the Constitution.

VII

On the basis of the foregoing, we reverse the Commission's decision that a flat ban on all editorial advertising is permissible. However, we remand these cases to the Commission for further consideration. On remand, the Commission should develop reasonable regulatory guidelines to deal with editorial advertisements. Petitioners should be allowed to reapply for advertising time; and, unless their presentations are found to be excludable under the Commission's guidelines, their applications should be accepted. Since the issues on which BEM and DNC seek to speak are current and changing, it is essential that regulations be developed speedily and that the affected broadcasters pass promptly upon petitioners' applications to buy time.

In the end, it may unsettle some of us to see an anti-war message or a political party message in the accustomed place of a soap or beer commercial. But we must not equate what is habitual with what is right—or what is constitutional. A society already so saturated with commercialism can well afford another outlet for speech on public issues. All that we may lose is some of our apathy. That is a small price to pay. For, as the Supreme Court has said, "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions

as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

Reversed and remanded.

McGOWAN, *Circuit Judge, dissenting*: The majority do not hold that petitioner in No. 24,492 is entitled to have its proposed spot announcements carried by the intervenor-licensee there involved, or that the petitioner in No. 24,537 is assured of being able to buy time for its programs on public issues. What is held is that the Constitution commands that "some", but not all, editorial advertising be accepted; and the Commission is directed to embark upon rulemaking to determine how a licensee is to differentiate the "*some*" from the all.

The majority appear to believe that this assignment will not prove difficult. I am not so sure, particularly when I note that the only Commissioner who has perceived the same constitutional requirement as the majority responds to the practical problems by suggesting that sales of a significant proportion of the total broadcast time be made on a first-come, first-served basis, accompanied by a possible suspension of the fairness doctrine. That approach does not seem to me a promising one in terms of the public's right to know.

The difficulties derive, of course, from the physical peculiarity which distinguishes radio and television communication from all other forms, namely, the limited number of frequencies and the impossibility of accommodating all who may wish to be heard over them. This, so the Supreme Court has said in *Red Lion*, makes it "idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of each individual to speak, write or publish." The majority, in recognition of this fact, do

not purport to discern other than an "abridgeable" or "limited" First Amendment right to initiate paid editorial advertising. Petitioners themselves, it is said, may conceivably never be able to insist that their particular advertising be accepted. That will depend upon the rules which the Commission propounds.

The Commission has, at the least, been set a task of heroic proportions, and one whose very complexities may undermine the premise upon which it is founded. The question is whether the Constitution requires that it be undertaken. I am not convinced that it does. It is presently the obligation of a licensee to advance the public's right to know by devoting a substantial amount of time to the presentation of controversial views on issues of public importance, striking a balance which is always subject to redress by reference to the fairness doctrine. Failure to do so puts continuation of the license at risk—a sanction of tremendous potency, and one which the Commission is under increasing pressure to employ.

This is the system which Congress has, wisely or not, provided as the alternative to public ownership and operation of radio and television communications facilities. This approach has never been thought to be other than within the permissible limits of constitutional choice. Its existence provides a mechanism for implementation of the public's right to know which, by and large, has been effective. Indeed, the loudest voices in criticism of it complain that it has been working too well for the comfort of governmental policy makers in the areas of greatest current concern.

It is hardly the path of wisdom to scrap it for a system in which money alone determines what issues are to be aired, and in what format, even assuming, as is likely to be the case, that those issues, whatever they may prove to be, compare favorably with the intellectual content of

the great bulk of commercial advertising. The responsibility for informing the public is now squarely on the licensee. That responsibility will only be diluted and obscured by requiring the licensee, against his own better judgment, to accept paid editorial advertising. I do not think the First Amendment requires that result, at least not within the context of a regulatory scheme which has made provision for the airing of controversial issues of public importance.

Of course it is true that licensees are currently free to accept paid editorial advertising, and some do, subject always to the limitations of the fairness doctrine. It may well be that a detailed inquiry and investigation by the Commission of this area, by formal rulemaking or otherwise, would be both useful and consonant with the Commission's continuing obligation to see to it that the public interest obligations of the licensees are being met in the most effective way. The Commission's currently announced purpose to undertake a comprehensive and wide-ranging review of the operation of the fairness doctrine might well include the subject of paid editorial advertising. But, believing as I do that the First Amendment exerts no compulsion to the contrary, I would not order the Commission to undertake that review in a constitutional strait jacket which dictates the result in advance.

Order Entering Judgment

492

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1970

No. 24,492

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
Intervenor.

No. 24,537

DEMOCRATIC NATIONAL COMMITTEE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

AMERICAN BROADCASTING CO., INC.,
Intervenor,

COLUMBIA BROADCASTING SYSTEM, INC.,
Intervenor.

Petitions for Review of Orders of the Federal Communications Commission

Before: Wright, McGowan and Robinson, Circuit Judges.

JUDGMENT

These cases came on to be heard on the records from the Federal Communications Commission, and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the orders of the Federal Communications Commission on review herein are hereby reversed and the cases are remanded to the Federal Communications Commission for further proceedings in accordance with the opinion of the Court filed this date.

Per Curiam

For the Court:
Nathan J. Paulson
Clerk

Dated: August 3, 1971

Opinion by Circuit Judge Wright
Separate dissenting opinion by Circuit Judge McGowan

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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AMERICAN BROADCASTING CO., INC.,
Intervenor,
COLUMBIA BROADCASTING SYSTEM, INC.,
Intervenor.

Before: Wright, McGowan and Robinson, Circuit Judges.

ORDER

On consideration of the petitions for rehearing filed by Post-Newsweek Stations, Capital Area, Inc., American Broadcasting Companies, Inc., the United States of America and Federal Communications Commission, and Columbia Broadcasting System, Inc. for rehearing, and of the brief of *amicus curiae* National Broadcasting Company, Inc. in support of the petitions for rehearing, it is

ORDERED by the Court that the aforesaid petitions for rehearing are denied.

Per Curiam

October 4, 1971

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1970

No. 24,492

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FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

AMERICAN BROADCASTING CO., INC.,
COLUMBIA BROADCASTING SYSTEM, INC.,
Intervenors.

Before: Wright, McGowan and Robinson, Circuit Judges.

ORDER

On consideration of respondents' further motion for stay of mandate to and including November 22, 1971, it is

ORDERED by the Court that respondents' aforesaid motion is denied.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA COURT

SEPTEMBER TERM, 1971

No. 24,492

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE,
Petitioner,

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and UNITED STATES OF AMERICA,
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Respondents,

AMERICAN BROADCASTING CO., INC.,
Intervenor,
COLUMBIA BROADCASTING SYSTEM, INC.,
Intervenor.

Before: Wright, McGowan and Robinson, Circuit Judges.

ORDER

On consideration of the answer of Post-Newsweek Stations, Capital Area, Inc. intervenor in No. 24,492 in support of the motion of the Federal Communications Commission for a 30 day stay of mandate until November 22, 1971, it is

ORDERED by the Court that this Court adheres to its prior ruling denying the motion of the Federal Communications Commission to further stay the mandate until November 22, 1971.

Per Curiam

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ———

COLUMBIA BROADCASTING SYSTEM, INC.,
Petitioner,

v.

DEMOCRATIC NATIONAL COMMITTEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Columbia Broadcasting System, Inc. ("CBS") hereby petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review that court's judgment of August 3, 1971, in *Democratic National Committee* v. *FCC*, No. 24,537, which was decided together with *Business Executives' Move for Vietnam Peace* v. *FCC*, No. 24,492, in a single opinion. CBS intervened in support of the respondents in the *Democratic National Committee ("DNC")* case, and participated as a party before the court of appeals both in briefs and oral argument.

We understand that the Federal Communications Commission and the United States are also petitioning for certiorari to review the court of appeals' decision. *FCC* v. *Business Executives' Move for Vietnam Peace; FCC* v. *Democratic National Committee.*

OPINIONS BELOW

The court of appeals' opinion, Appendix A,* has not yet been officially reported. The opinion of the Federal Communications Commission, Appendix D, is reported at 25 F.C.C.2d 216 (1970).

JURISDICTION

The judgment of the court of appeals, Appendix B, was entered on August 3, 1971. Timely petitions for rehearing were denied by an order of the court of appeals, Appendix C, entered on October 4, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Broadcast licensees are required under the regulatory scheme established by the Communications Act and the policies of the Federal Communications Commission to provide full and fair coverage of controversial public issues. The question presented is whether the decision by Congress and the Commission not to compel broadcasters to sell advertising time for presentation of views on such issues violates the First Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

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* Appendices A through D are contained in a separately bound volume accompanying this petition.

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 3(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 153(h), provides:

"'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

Section 315 of the Communications Act of 1934, as amended, 47 U.S.C. § 315, provides:

"(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section."

STATEMENT OF THE CASE

This case involves a request by the Democratic National Committee ("DNC") for a declaratory ruling by the Federal Communications Commission (the "Commission") that broadcast licensees generally must sell time to "responsible entities, such as DNC, for the solicitation of funds and for comment on public issues." [1] DNC made no claim that any licensee had failed to carry out his responsibility to present full and fair coverage of significant issues pursuant to the Commission's fairness doctrine approved by this Court in its leading *Red Lion* decision.[2] Rather, DNC sought a ruling that, even if a licensee has fully complied with the fairness doctrine, he still must sell time to "responsible entities" like DNC to present their individual views on issues they choose to discuss.[3]

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[1] App. D 1. As noted above, the Appendices are contained in a separately bound volume accompanying this petition.

[2] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

[3] App. D 13-14

CBS, which is the licensee of a number of radio and television stations and which operates a radio and a television network, urged the Commission to deny the requested ruling. CBS' response[4] described in detail its policy with respect to presentation of viewpoints on public issues, which provides substantial direct exposure for partisans and partisan views, on a free basis, as part of a total professional journalistic effort.[5] In this connection CBS submitted a detailed exhibit of more than 100 pages showing the numerous partisan views on the Vietnam War issue presented on the CBS Television Network and WCBS-TV (New York City) during a six-month period.[6]

CBS pointed out that it had also adopted a related policy of declining generally to sell time for the presentation of particular views on controversial issues of public importance because it had concluded that selling time for these purposes would substantially undermine its efforts through professional journalists to provide full and fair coverage. CBS expressed particular concern that the requirement proposed by DNC would create inordinate advantages for affluent partisans, make questions of fairness and balance turn upon the accident of partisan requests for time, and result in a diminution of time available for broadcaster-initiated news and public affairs programs.

By a 6-1 vote, the Commission rejected DNC's request for a declaratory ruling. The Commission noted that there is no Commission policy that precludes licensees

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[4] The CBS response is summarized in the Commission's opinion (App. D 5-9).

[5] For example, in addition to supplying time for Presidential appearances, time is periodically provided, without charge, to leading opposition spokesmen. See *Columbia Broadcasting System, Inc.* v. *FCC*, —— U.S. App. D.C. ——, —— F.2d —— (No. 24,655, decided Nov. 15, 1971), involving a "Loyal Opposition" broadcast presented by CBS.

[6] App. D 6 n.3.

from selling time for the presentation of views on public issues in individual cases in which they believe it to be appropriate, so long as they also comply with their fairness doctrine responsibilities.[7] However, the Commission held that licensees are not required to sell time for the presentation of individual views. It concluded that under the statutory scheme established by Congress in the Communications Act, and approved by the decision of this Court in *Red Lion*, licensees are not "common carriers" who passively transmit the views of others, but rather are public trustees obligated to provide their listeners with full and fair coverage of controversial issues of public importance:

> "As *Red Lion* makes clear, the licensee is a fiduciary with obligations to present views and voices which are representative of his community. It is through this basic approach that the paramount right and interest of the public to be fully informed is protected." [8]

The Commission emphasized that in fulfilling that responsibility under the Commission's fairness doctrine, a licensee must present representative views; that he cannot rule out coverage of particular views because he disagrees with them; and that "partisan voices" must be included.[9] But the Commission held that a licensee who has satisfied these obligations under the fairness doctrine is not required, in addition, to sell time for the presentation of individual views. Any such requirement, the Commission held, would interfere with and undermine the fairness doctrine and the "public trustee" scheme of regulation chosen by Congress. With the elimination of licensee choice of representative spokesmen and significant issues, "the public's agenda for discussion of public issues would then be set substantively and increasingly

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[7] App. D 18.

[8] App. D 21. See also App. D 16.

[9] App. D 12.

by the affluent—by the person or group which '. . . has the financial resources and interest to purchase sustained access to the mass communications media. . . .' " [10]

On the same day that it denied DNC's request for a declaratory ruling, the Commission also rejected by a 6-1 vote a specific complaint against a radio station (WTOP (AM), Washington) for refusing to sell "spot" advertising time [11] to present the views of an organization opposing the Vietnam War. *Business Executives' Move for Vietnam Peace ("BEM")*, 25 F.C.C.2d 242 (1970). As in *DNC*, BEM's claim was basically that the First Amendment required the station involved to sell BEM time for the presentation of its individual views, even though the station had fully complied with its fairness doctrine obligations with respect to the Vietnam War issue.[12] The Commission rejected the claim, relying in large part on its *DNC* opinion.

On petitions for review of the Commission's *DNC* and *BEM* decisions, a divided panel of the court of appeals reversed the Commission in both cases.[13] Judge Wright, for the majority of the court, held that the Commission

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[10] App. D 16, quoting *Banzhaf* v. *FCC*, 132 U.S. App. D.C. 14, 34, 405 F.2d 1082, 1102 (1968), *cert. denied sub nom. Tobacco Institute* v. *FCC*, 396 U.S. 842 (1969). In his dissent, Commissioner Johnson urged the adoption of an even broader requirement for the sale of time than suggested by DNC. App. D 27-40. Recognizing that an individual right to purchase time might well be incompatible with the fairness doctrine, Commissioner Johnson suggested that the fairness doctrine be suspended, if necessary, to make the new requirement feasible. App. D 35.

[11] Advertising time is sold by broadcasters in short "spot" time segments, typically of one minute or less.

[12] BEM included a vague charge of violation of the fairness doctrine in its complaint to the Commission, to which the station responded by extensively documenting its coverage of views opposed to the Vietnam War. The Commission held that BEM had failed to sustain its burden on the fairness doctrine complaint, and the court of appeals did not reach that issue. App. A 6.

[13] Jurisdiction of the court of appeals was based upon Section 402(a) of the Communications Act, 47 U.S.C. § 402(a).

must under the First Amendment require broadcast licensees who sell time for the presentation of commercial product announcements to sell advertising time as well to individuals or organizations seeking to present their particular views on controversial public issues.[14]

Attempting to come to terms with the fact that not all who seek to speak over a given broadcast facility can be accommodated, the court of appeals majority held that the new First Amendment right which it had created was a limited, "abridgeable" right.[15] Reasonable limitations may be imposed, Judge Wright indicated, upon the total amount of advertising time to be sold for such purposes and on the amount of time to be sold to a single individual or group or to representatives of a particular viewpoint.[16] But he made clear that in the court's view the Commission could not permit licensees to exercise their traditional journalistic role of selecting the particular issues and contrasting viewpoints to be presented. The individual constitutional right to purchase time for "editorial advertisements" applies, under the court's opinion, even if there is no suggestion of lack of compliance with the Commission's fairness doctrine; even if the issue on which the person or group seeks to speak is one that has been fairly covered by the licensee or is of minimal interest or importance; even if the licensee has already presented without charge the views of the person or group seeking to purchase time or believes that some other person or group is a more appropriate spokesman for the particular views sought to be discussed; and, apparently, even if the licensee deems the material sought to be pre-

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[14] The court of appeals' holding does not apply to program time —time devoted by broadcasters to more lengthy presentation of entertainment, news, public affairs and other non-commercial material. See, *e.g.*, App. A 18-19, 35.

[15] App. A 21.

[16] App. A 36-38.

sented to be unduly inflammatory, offensive, or otherwise unsuitable for broadcasting into the home.[17]

The court remanded the cases to the Commission to "develop reasonable regulatory guidelines," [18] applicable to the entire broadcast industry, governing the sale of spot advertising time for the presentation of views on controversial issues.

Judge McGowan dissented, expressing concern that the new First Amendment right created by the court would undermine the public's right to be informed which this Court held to be central in *Red Lion*.[19] The present regulatory system, requiring licensees "to advance the public's right to know" through full and fair coverage of controversial issues was deliberately chosen by Congress, Judge McGowan pointed out, and "has never been thought to be other than within the permissible limits of constitutional choice." [20] The majority's holding, Judge McGowan emphasized, would place a "constitutional straitjacket" on the Commission,[21] requiring it to scrap the present regulatory system provided by Congress for one "in which money alone determines what issues are to be aired, and in what format." [22]

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[17] App. A 21-25, 28-30.

[18] App. A 40.

[19] App. A 41-44.

[20] App. A 43.

[21] App. A 44.

[22] App. A 43.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Has Decided an Important Constitutional Question Which Has Not Been, But Should Be, Resolved by This Court.

In its decision in this case, the majority of the court of appeals has promulgated a novel constitutional doctrine with far-reaching implications for all broadcast licensees and all broadcast journalists. The court of appeals' decision requires Congress and the Commission to remove the licensee from his traditional position of responsibility and accountability as trustee for the public interest. It forces Congress and the Commission to require the licensee to share the basic responsibility to determine the manner in which public issues will be presented with private individuals and groups who have no duty to serve the public and who do not necessarily have any qualifications other than the ability to pay.

Thus the court of appeals has held that the regulatory scheme governing broadcasters developed by Congress and the Commission over the last four decades, and upheld by this Court in its landmark *Red Lion* decision, is constitutionally insufficient, and that the First Amendment can be satisfied only by the creation of a new right to purchase advertising time to present individual views on public issues. If left standing, this decision will inevitably undermine the public's right to be fully and fairly informed which is at the heart of the existing regulatory scheme.

In establishing that scheme of regulation, Congress chose to deal with the problem of limited frequencies, not by making broadcasters common carriers, but rather by setting up a system of licenses subject to periodic renewal, under which licensees are made accountable to the Commission for the operation of their facilities "in the public interest, convenience, and necessity."[23] Con-

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[23] *Red Lion*, 395 U.S. at 375-77; *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943). Section 3(h) of the Communi-

gress, acting to promote the First Amendment, wisely chose to intrude as little as possible into the workings of a free broadcast press and to assure that licensees fully serve the interest of the public in receiving full and fair coverage of controversial issues of public importance. In that critical area, the central regulatory vehicle for ensuring that licensees serve the public interest has been the fairness doctrine. That doctrine, first set forth in detail in the Commission's *Report on Editorializing by Broadcast Licensees* in 1949,[24] was incorporated into the Communications Act by Congress in 1959,[25] and upheld by this Court in *Red Lion*.

The fairness doctrine, this Court has noted, imposes "a twofold duty" on licensees. "The broadcaster must give adequate coverage to public issues . . . , and coverage must be fair in that it accurately reflects the opposing views." *Red Lion*, 395 U.S. at 377. As the Commission made clear in its opinion in this case, this duty may not be carried out by licensees in a bland fashion, with all viewpoints filtered through the licensee himself. Rather, licensees must present "representative community views and voices" on public issues and "some of the voices must be partisan."[26] In short, they must provide their listeners with a robust presentation of competing views on the issues of the day.

But the hallmark of the fairness doctrine is licensee responsibility, and its touchstone is the public's right to know. Thus, the Commission has always made clear that an individual does not have a personal right to make a

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cations Act, 47 U.S.C. § 153(h), expressly provides that licensees shall not be deemed common carriers. And the legislative history of the Act shows that this represented a fundamental policy choice by Congress. See App. D 14-15.

[24] 13 F.C.C. 1246 (1949).

[25] 73 Stat. 557 (1959), amending Section 315 of the Communications Act, 47 U.S.C. § 315. See *Red Lion*, 395 U.S. at 381-85.

[26] App. D 12.

broadcast presentation of his views on a particular issue. His request to do so (whether on a paying or non-paying basis) may be rejected by a licensee on the ground that the subject in question is trivial or not of significant public interest; that the views in question have already been presented through the appearance of some other individual or covered by the licensee in some other fashion; or that the licensee believes some other person could more appropriately present the point of view in question.[27]

The informed decision of Congress and its expert administrative agency to reject a common carrier approach and to leave to broadcasters maximum journalistic freedom [28] is fully consistent with the First Amendment. This decision by Congress, which has always been thought to be "within the permissible limits of constitutional choice," [29] should not lightly be frustrated. Certainly the First Amendment should not be distorted in a manner that would permanently handicap Congress and the Commission in dealing with a dynamic and delicate area of regulation and that would severely frustrate the basic purposes of that constitutional guarantee.

As this Court stated in *Red Lion*, in view of the limited number of broadcast frequencies compared to the number of individuals wishing to broadcast, "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish." 395 U.S. at 388. The paramount right protected by the First Amendment is the right of the viewing and listening public to be informed:

> "It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here. That

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[27] *E.g.*, *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1251-52 (1949); App. D 11-12.

[28] See Section 326 of the Communications Act, 47 U.S.C. § 326.

[29] App. A 43 (Judge McGowan, dissenting).

right may not constitutionally be abridged either by Congress or by the FCC." 395 U.S. at 390.

The existing regulatory scheme was upheld by this Court in *Red Lion* because that scheme affirmatively served this paramount interest and the purposes of the First Amendment.

The court of appeals' decision effectively rejects the view of this Court that there is no "First Amendment right to broadcast comparable to the right of every individual to speak, write or publish." Judge Wright recognized not only that there was "scant precedent" for claiming an individual First Amendment right to purchase broadcast time, but also that previous efforts to establish such a right had failed.[30] He was forced to rely on a number of lower court cases involving other forums such as municipal transportation systems and bus terminals which bear little resemblance to the broadcast press.[31] In these cases the courts forbade discrimination in the sale of advertising space between commercial advertisers and those seeking to discuss controversial issues. The court below found a similar discrimination in the refusal of broadcasters who sell time for commercial advertisements to sell advertising time for discussion of controversial issues.

The court's reliance is misplaced. A bus company has no statutory or journalistic responsibility to provide bus riders with full and fair coverage of public issues.[32] Broadcasters, however, are subject to requirements as licensees, including the obligation under the fairness doctrine to present contrasting views on significant issues. These requirements effectively preclude discrimination against controversial issue discussion and provide an important reason for treating discussion of public issues dif-

[30] App. A 11.

[31] App. A 28-29.

[32] See *Wirta* v. *Alameda-Contra Costa Transit District*, 68 Cal.2d 51, 434 P.2d 982, 989-90 (1967).

ferently from commercial advertising. Indeed, the new constitutional right created by the court below, which virtually guarantees that controversial issue discussion will be haphazard, is fundamentally inconsistent with the paramount First Amendment right of the public to be informed which is served by the fairness doctrine.

Judge McGowan, like the Commission, correctly perceived this inherent conflict. His dissent points out the fundamental inconsistency between the fairness doctrine, under which licensees are held accountable "to advance the public's right to know" through full and fair coverage of public issues, and a system "in which money alone determines what issues are to be aired, and in what format." [33]

It is no answer to suggest, as the court of appeals does,[34] that this conflict can be avoided through development by the Commission of "reasonable regulations" that will limit the new constitutional right. The inherent conflict recognized by Judge McGowan cannot thus be avoided, for the court, in conferring initiative and control upon those who can buy time, clearly bars Congress and the Commission from permitting licensees to exercise the responsible choice necessary to serve the public's right to be informed. It is precisely the element of licensee responsibility so central to the fairness doctrine that the court of appeals plainly excludes from the new regulatory system it requires the Commission to impose on licensees. Judge Wright makes clear that Congress and the Commission cannot permit licensees to refuse to sell spot advertising time on the ground that similar or the same viewpoints have already been fully covered; or that there are more significant issues deserving of coverage; or apparently on any ground relating to content.[35] The

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[33] App. A 43 (Judge McGowan, dissenting).

[34] App. A 4, 36, 40.

[35] App. A. 21-25, 28-30.

selection of spokesmen from among all persons and groups seeking to buy time would therefore have to be made on a first-come, first-served basis or on some other mechanical basis [36] that can only produce arbitrary results.

Thus, licensees would be replaced in their Congressionally appointed role as accountable public trustees by the haphazard choices of persons who wish to and can afford to buy time. As the Commission aptly put it, "the public's agenda for discussion of public issues" would be set "by the affluent," [37] who have neither professional journalistic responsibilities nor any statutory obligation to serve the public's right to be informed. The Commission would be forced to require licensees to devote time to views expressed in paid editorial advertisements and (under existing Commission policy) to replies to those views, often on issues that are stale and insignificant, thus diminishing the time available for treating other important issues. It is difficult to understand how the paramount right of the public to be informed is served by selling time to an individual or group to present views that have already been presented or views on a trivial issue.

The end result of the court of appeals' decision, if not reversed by this Court, will be to distort the discussion of public issues in the broadcast medium and to create an anomalous discrimination in favor of affluent partisans. In other contexts, the Government has been held to be barred from establishing criteria favoring the wealthy,[38] but here the court of appeals has held that the Government must establish a system which has exactly that purpose and effect.

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[36] See App. A 42 (Judge McGowan, dissenting).

[37] App. D 16.

[38] See, *e.g.*, *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Douglas* v. *California*, 372 U.S. 353 (1963); *Williams* v. *Illinois*, 399 U.S. 235 (1970).

We suggest, moreover, that the course which the court of appeals has required will inevitably lead to a situation in which the Commission must itself make the judgments as to what is important, what has been covered, what should be aired and who should speak. Any mechanical allocation of time will produce results that cannot be squared with effective and reasonably informative discussion of public issues. Judgments of selection as to subjects and speakers must be made by someone. It is simply impossible to confer initiative and responsibility for such judgments on the public generally, as the court below has attempted to do. Destruction of the mechanism of license responsibility created by the Communications Act would thus leave a vacuum—one that would be filled by the agencies of government.

Consider, for example, the problem of limiting the time to be sold to any one "narrow viewpoint." The court below recognizes a need for such a limitation and states that one may be imposed.[39] At the same time, however, the court apparently feels that the judgment whether two allegedly different viewpoints are in fact identical is too subtle to be left in the hands of broadcasters, even subject to Commission review for unreasonableness.[40] Who, then, is to make the judgment? In the event of a dispute, whose decision will be controlling? Plainly, the Commission and the courts, to whom these issues would be brought, would be forced to make the decisions. Every licensee rejection of a request to purchase advertising time for the presentation of views on public issues would become an occasion for a governmental decision of constitutional magnitude; every person whose request to purchase time is denied by a licensee would have a claim that his First Amendment rights were infringed. There would be no presumption in favor of the licensee's judg-

[39] App. A 38.

[40] App. A 25, 38.

ment, as there is in principle under the fairness doctrine.[41] The burden of resolving claims of constitutional right would inevitably fall on the Commission and, ultimately, the courts.

Thus, any attempt to moderate the rigors of a mechanical allocation of time would demand an extraordinary extension of government control over speech. A course raising graver First Amendment issues would be hard to conceive.

For these reasons, we think it clear that the court of appeals has decided an important constitutional issue that should be authoritatively resolved by this Court.

II. The Decision of the Court of Appeals Is in Conflict with a Decision of the Third Circuit.

The decision below is in square conflict with a decision of the Third Circuit rejecting a claim of an individual First Amendment right to purchase time on broadcast facilities.

In *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3rd Cir. 1945), *cert. denied*, 327 U.S. 779 (1946), a religious organization urged that it had a right under the Communications Act and the First Amendment to purchase time on a station for broadcast of its programs. The Third Circuit rejected the claim. It held that under the scheme of regulation established by the Communications Act, broadcasters were public trustees rather than public utilities and that "Congress has confided the selection of program material to be broadcast to the taste and discrimination of the broadcasters." 151 F.2d at 600. Recalling this Court's observation in the *NBC* case that "unlike other modes of expression radio inherently is not available to all," [42] the Third Cir-

[41] See, *e.g.*, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598, 599 (1964).

[42] *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226 (1943).

cuit held that plaintiffs had no First Amendment right to purchase broadcast time:

> "True, if a man is to speak or preach he must have some place from which to do it. This does not mean, however, that he may seize a particular radio station for his forum. . . . [A] radio broadcasting station is not a public utility in the sense that it must permit broadcasting by whoever comes to its microphones." 151 F.2d at 600-01.[43]

The court of appeals below dismissed *McIntire* as a case reflecting "a crabbed judicial view of 'state action.'" [44] This represents, we submit, a "crabbed" view of *McIntire*; for the Third Circuit's holding on the "state action" issue was accompanied by a square rejection of the First Amendment claim on its merits. This is confirmed by a recent Third Circuit decision. In *Avins* v. *Rutgers*, 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968), a case in which state action clearly was present, the Third Circuit relied squarely on *McIntire* in rejecting the First Amendment claim of an author to have his article published in the law review of a state law school. The court stated:

> "The right to freedom of speech does not open every avenue to one who desires to use a particular outlet for expression. On the contrary, each particular avenue for expression presents its own peculiar problems. . . . Nor does freedom of speech comprehend the right to speak on any subject at any time. . . .

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[43] Compare *Green* v. *FCC*, —— U.S. App. D.C. ——, 447 F.2d 323, 328 (1971), in which another panel of the District of Columbia Circuit stated that apart from political candidates who are entitled to "equal opportunities" (under Section 315 of the Communications Act), "no individual member of the public has the right of access to the air; the licensees may exercise their judgment as to what material is presented and by whom." See also *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950).

[44] App. A 11. Unlike *McIntire*, where the action was a private one against a broadcaster, the proceeding below involves review of a Commission order.

> As this court said in McIntire v. Wm. Penn Broadcasting Co. of Philadelphia, 1945, 151 F.2d 597, 600-601, cert. den. 327 U.S. 779, 66 S.Ct. 530, 90 L.Ed. 1007, 'True, if a man is to speak or preach he must have some place from which to do it. This does not mean, however, that he may seize a particular radio station for his forum.' " 385 F.2d at 153.

The *Avins* decision underscores the conflict created by the decision of the court of appeals in this case with the decision of the Third Circuit in *McIntire*, and the need for this Court to resolve that conflict.

CONCLUSION

For the above reasons, certiorari should be granted.

Respectfully submitted,

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January 3, 1972

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,492

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC., INTERVENOR

No. 24,537

DEMOCRATIC NATIONAL COMMITTEE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING COMPANIES, INC. and COLUMBIA BROADCASTING SYSTEM, INC., INTERVENORS

Petitions for Review of Orders of the Federal Communications Commission

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Decided August 3, 1971

Mr. Thomas R. Asher, with whom *Messrs. Albert H. Kramer* and *Michael Schneiderman* were on the brief, for petitioner in No. 24,492.

Mr. Joseph A. Califano, Jr., with whom *Messrs. David H. Lloyd* and *Irvin B. Nathan* were on the brief, for petitioner in No. 24,537.

Mr. Daniel R. Ohlbaum, Deputy General Counsel, Federal Communications Commission, for respondents.

Messrs. John H. Conlin, Associate General Counsel, and *Stuart F. Feldstein*, Counsel, Federal Communications Commission, were on the brief for respondents in No. 24,492. *Mr. John H. Conlin* and *Miss Katrina Renouf*, Counsel, Federal Communications Commission, were on the brief for respondents in No. 24,537.

Mr. Henry Geller, General Counsel, Federal Communications Commission, at the time the record was filed, also entered an appearance for respondent Federal Communications Commission in No. 24,492.

Mr. Howard E. Shapiro, Attorney, Department of Justice, entered an appearance for respondent United States of America.

Mr. Ernest W. Jennes, with whom *Messrs. Charles A. Miller* and *Henry Goldberg* were on the brief, for intervenor in No. 24,492.

Mr. J. Roger Wollenberg, with whom *Messrs. Timothy B. Dyk* and *Daniel Marcus* were on the brief, for intervenor Columbia Broadcasting System, Inc. in No. 24,537.

Messrs. James A. McKenna, Jr. and *Vernon L. Wilkinson* were on the brief for intervenor American Broadcasting Companies, Inc. in No. 24,537.

Before WRIGHT, MCGOWAN and ROBINSON, *Circuit Judges.*

Opinion filed by WRIGHT, *Circuit Judge.*

Dissenting opinion filed by MCGOWAN, *Circuit Judge.*

WRIGHT, *Circuit Judge*: In these cases we are asked to decide whether a broadcast licensee may, as a general policy, refuse to sell any of its advertising time to groups or individuals wishing to speak out on controversial public issues. The Federal Communications Commission concluded that such a policy is permissible.[1] We reverse the Commission's decision. And we remand for further proceedings.

The principle at stake here is one of fundamental importance: it concerns the people's right to engage in and to hear vigorous public debate on the broadcast media. More specifically, it concerns the application of that right to the substantial portion of the broadcast day which is sold for advertising. For too long advertising has been considered a virtual free fire zone, largely ungoverned by regulatory guidelines. As a result, a cloying blandness and commercialism—sometimes said to be characteristic of radio and television as a whole—have found an especially effective outlet. We are convinced that the time has come for the Commission to cease abdicating responsibility over the uses of advertising time. Indeed, we are convinced that broadcast advertising has great potential for enlivening and enriching debate on public issues, rather than drugging it with an overdose of non-ideas and non-issues as is now the case.

Under attack here is an allegedly common practice in the broadcast industry—airing only those paid presentations which advertise products or which deal with "non-controversial" matters, and confining the discussion of controversial public issues to formats such as the news or documentaries which are tightly controlled and edited by the broadcaster. In the Commission's view, an attack on the permissibility of this practice "goes to the heart of the system of broadcasting which has developed in this coun-

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[1] *Business Executives Move for Vietnam Peace*, 25 F.C.C.2d 242 (1970); *Democratic National Committee*, 25 F.C.C.2d 216 (1970).

try." [2] We disagree. The actual issue before us is relatively narrow and we decide it narrowly. We do not have to cut to the "heart" of our system of broadcasting; we leave undisturbed the licensee's basic right to exercise judgment and control in public issue programming and the sale of advertising time. All we do is forbid an *extreme* form of control which totally excludes controversial public debate from broadcast advertising time.

We hold specifically that a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted. We do not hold, however, that the planned announcements of the petitioners—or, for that matter, of any other particular applicant for air time—must necessarily be accepted by broadcast licensees. Rather, we confine ourselves to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many "editorial advertisements" will be put on the air.

I

Both petitioners in these cases are organizations whose primary *modus operandi* is public persuasion and communication. As a rule, they do not attract attention to their views by performing newsworthy acts, such as engaging in civil disobedience or organizing mass demonstrations. They depend, instead, on their ability to get a hearing—as full as possible and as direct as possible—from the general public. Surely radio and television would seem to be the most effective media for their purposes. Yet they contend that their self-expression on those media—and, therefore, the public's access to their views—is significantly inhibited by broadcaster policies barring any and all paid editorial messages from the airwaves.

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[2] *Democratic National Committee, supra* Note 1, 25 F.C.C.2d at 221.

The Business Executives Move for Vietnam Peace (BEM) is a national organization of over 2,700 business owners and executives, organized in opposition to the war. BEM apparently believes that it is in a position to offer the public a unique viewpoint on what is no doubt one of the great political and moral issues of our time. In order to communicate that viewpoint, it prepared several recorded one-minute radio announcements. The announcements urged "immediate withdrawal of American forces from Vietnam and from other overseas military installations" and featured statements by leading businessmen and retired military officers whose views may carry particular weight with the general public. BEM sought to buy time to air these announcements on the broadcast media, just as commercial advertisers do. It must have seemed an extraordinarily effective means of directly communicating its ideas and sense of urgency to the broad listening audience.

In June 1969 BEM sought to purchase time for its announcements on WTOP, an all-news radio station in the nation's capital. Like most broadcasters, WTOP sells substantial amounts of time for short advertisements. Yet over a period of eight months it repeatedly refused to sell any time to the business executives. WTOP cited no particular objection to the planned announcements. Rather, it relied solely upon an across-the-board policy barring all editorial advertisements—"its long established policy of refusing to sell spot announcement time to individuals or groups to set forth views on controversial issues." [3] BEM then filed a complaint with the Federal Communi-

[3] WTOP also stated "that 'subjects of this type require a more in-depth analysis than can be provided in a 10, 20, 30 or 60 second announcement.'" *Business Executives Move for Vietnam Peace*, *supra* Note 1, 25 F.C.C.2d at 242. There is no indication, however, that WTOP's "long established policy" of refusing to sell time for *any* controversial advertisement would have permitted it to sell BEM 5 minutes or 10 minutes for a more "in-depth" treatment of its antiwar views. For a discussion of the permissibility of a flat ban on "short" public issue advertisements, *see* text at page [A-26] *infra*.

cations Commission alleging violations of both the fairness doctrine and the First Amendment.

The Democratic National Committee (DNC) came to the Commission with much the same sort of complaint. It stated that it was in the process of planning an extensive media campaign to communicate the Democratic Party's views on crucial issues and to solicit funds. In our political system, it is of obvious importance that the public have access—as direct and full as possible—to the views of the political parties. A party currently out of office may well regard such communication as particularly vital. Yet DNC alleged that it confronted several obstacles to direct self-expression on the broadcast media, among them the refusal of some broadcasters to sell time for comment on controversial public issues. Unlike the business executives, DNC did not complain of any individual refusal to sell time for a particular editorial advertisement. Rather, it cast the issue in a somewhat different light by seeking a declaratory ruling from the Commission that "[a] broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues."

The Commission considered the two cases together and rejected the arguments of both BEM and DNC on the same day. The issues involved did not overlap completely. For example, the Commission found a defect in the vagueness and generality of BEM's fairness doctrine complaint,[4] and it resolved DNC's contention concerning fund

[4] In its original complaint, BEM alleged generally that WTOP had failed to cover antiwar views fully and fairly. However, it offered no specific proof whatever of its allegations, and WTOP, on the other hand, offered a lengthy compilation of news and interview shows which aired the opinions of some antiwar groups and individuals. BEM has not pressed its fairness doctrine argument on appeal, but rather has relied solely upon the First Amendment right-of-access contention which it also made before the Commission. Therefore, we need not consider here the Commission's holding that BEM failed to shoulder its full burden of going forward under the fairness doctrine.

solicitation by noting that all three television networks had agreed to accept such solicitations and by stating that any broadcaster policy of confining solicitations to election periods alone "would appear arbitrary." [5] On the matters central to these petitions for review, however, the Commission resolved both cases in the same fashion, and we, therefore, are also considering them as one.

The Commission held that it is permissible for a broadcast licensee to follow a general policy of rejecting all editorial advertisements. The essence of its reasoning in the two cases was as follows: First, it interpreted the fairness doctrine to allow rejection of paid controversial announcements. The doctrine, evolved by the Commission and endorsed generally in the Communications Act, demands that all controversial issues of public importance be covered both fully and fairly by broadcasters. Yet the Commission held that it leaves the licensees broad leeway to exercise their professional judgment as to "the format for presentation of controversial issues 'and all others facets of such programming.'" Editorial advertising, the Commission said, is simply one of several possible formats for coverage of public issues. Under the permissive "reasonableness" standard of the fairness doctrine, acceptance of that particular format is by no means compulsory.

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[5] All three television networks also commented on the sale of time for editorial advertising. CBS stated it would sell no time for such advertising, although an exception would be made for broadcasts on behalf of political candidates or ballot propositions. ABC said it would not sell time to most groups for public issue advertising since that would inspire a "flood" of requests, but it would "be prepared, consistent with its other obligations, to accept such orders for time from major political parties as can be accommodated on a reasonable basis." And NBC stated it "has no policy which would prevent the purchase of program time envisioned by DNC." We are constrained to note here that any discrimination in the sale of editorial advertising time in favor of political parties alone or the "major" political parties—and totally excluding other more issue-oriented groups or "minor" political parties—would be highly suspect under the First Amendment. *See* text at pages [A-30 - A-32] *infra*.

Second, the Commission interpreted the First Amendment to be equally permissive. Its reasoning on this point was rather sparse. It made no effort, for example, to identify the peculiar First Amendment interests attaching to paid editorial announcements as opposed to coverage of controversial issues on news, interview or discussion programs. Instead, it was content to raise the spectre of the "chaos" and other practical difficulties that, it said, would attend a right of access to the broadcast media. The Commission concluded that the fairness doctrine's requirement of full and fair coverage—tolerant as it is of a flat ban on the editorial advertisement format of expression—provides as much protection of public debate as the First Amendment demands.

Before this court, both petitioners make substantially the same attack on the Commission's decision. They do not ask for a ruling that *all* editorial advertisements submitted to broadcasters must be accepted. Nor do they seek to foreclose entirely the broadcasters' exercise of reasonable discretion. What they advocate is a *limited* right of access to radio and television for paid public issue announcements. They attack the Commission's ruling that a total exclusion of such announcements is permissible.

II

Petitioners have left no stone unturned in their attack on the exclusion of editorial advertising. They have invoked the Communications Act's "public interest" requirement [6] and the statutory-regulatory fairness requirement [7]—as well as First Amendment principles—to support their argument. In other contexts, we might attempt

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[6] 47 U.S.C. §§ 307(d), 309(a) (1964).

[7] 47 U.S.C. § 315(a) (1964). For a discussion of the regulatory development of the fairness doctrine and its eventual adoption in the Communications Act, *see Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 375-381 (1969).

to avoid the constitutional issue by coming to a decision on nonconstitutional grounds. But that course is neither fruitful nor possible here.

Speaking specifically of the Commission, the Supreme Court has stressed the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 381 (1969). Thus the nonconstitutional question here is whether there are "compelling indications" that the public interest and fairness requirements compel some opening for public issue advertisements on radio and television. In matters of allocating burdens, reforming procedures and ensuring full attention to all relevant factors in agency decision making, we have not been reluctant to reverse the Commission in order to vindicate "the public interest." [8] We have also intervened to see that broad policies developed by the Commission under the fairness doctrine are applied fully and consistently to all cases.[9] However, when we are asked to reverse major substantive interpretations of the grand and open-ended statutory requirements, we tread somewhat more difficult terrain. Obviously, the requirements mean something and there must be a great range of actions which they foreclose to the Commission; but, in establishing the necessary guidelines, we must ourselves seek extrinsic guidance.

In these cases, that guidance comes from the Constitution. Petitioners have presented no "compelling" evidence from legislative history to indicate a congressional policy in favor of, or even a real congressional attention to, editorial advertising. Rather, their arguments on the non-

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[8] *See, e.g., Office of Communication of United Church of Christ* v. *F.C.C.*, 123 U.S.App.D.C. 328, 359 F.2d 994 (1966); 138 U.S. App.D.C. 112, 425 F.2d 543 (1969).

[9] *See, e.g., Retail Store Employees Union, Local 880* v. *F.C.C.*, —— U.S.App.D.C. ——, 436 F.2d 248 (1970).

constitutional points closely parallel their constitutional arguments. The general policy considerations which they invoke encompass all of the interests that would have to be evaluated under the relevant First Amendment law. It would make no sense for us to blind ourselves to the constitutional status of those interests and to the doctrine that has been build up around them.

What then might be the "compelling indications" we are to consider? The ones which seem to us truly "compelling" involve First Amendment principles. Thus we conclude that the constitutional question must be faced and is, indeed, the essence of these cases. Whether our decision is styled as a "First Amendment decision" or as a decision interpreting the fairness and public interest requirements "in light of the First Amendment" matters little.

III

It has always been clear that the broadcast media—so vital to communication in our society—are affected by strong First Amendment interests.[10] Yet the nature of those interests has not been so clear; an evolution of constitutional principles in this area is still very much in progress. Until quite recently, the only interest raised to constitutional status was that of the broadcast licensees themselves. In a leading case, the Commission's powers over program content were attacked and upheld with reference solely to the licensees' right of immunity from governmental interference with their "speech." The scarcity of broadcast frequencies was said to justify some regulation trenching on the broadcasters' First Amendment interests. *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943). These cases mark a new effort by mem-

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[10] *See, e.g., United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948). Congress itself has prohibited any interference by the Commission with "the right of free speech by means of radio communication." 47 U.S.C. § 326 (1964).

bers of the public to assert *their* First Amendment interests in the operations of radio and television.

There is scant precedent for such an effort. Indeed, the few previous attempts by individuals or groups to enforce their First Amendment interests in court have failed. In each case, the litigants have run up against not only an unreceptiveness to their constitutional theory, but also a crabbed judicial view of "state action"—a view that the "[First] Amendment limits only the action of Congress or of agencies of the federal government and not private corporations such as [broadcast licensees]." *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 1 Cir., 183 F.2d 497, 501 (1950); *McIntire* v. *Wm. Penn Broadcasting Co. of Philadelphia*, 3 Cir., 151 F.2d 597, 601 (1945). *See also Post* v. *Payton*, E.D. N.Y., 323 F. Supp. 799 (1971).

We believe the path is now clear of such doctrinal impedimenta. Perhaps the most important recent development is the Supreme Court's seminal decision in *Red Lion Broadcasting Co., supra.* There the Court upheld another aspect of the Commission's regulation of program content —the fairness doctrine's personal attack and campaign editorial rules. However, the Court's opinion went well beyond the scarcity rationale of the *National Broadcasting Co.* case. It justified the Commission's interference with broadcasters' free speech by invoking specifically constitutional rights of the general public which, it said, underlie and support the fairness doctrine rules at issue. Issuing what must become a clarion call for a new public concern and activism regarding the broadcast media, the Court stated that "the people as a whole retain their * * * collective right to have the medium function consistently with the ends and purposes of the First Amendment." [11] It went on to say:

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[11] 395 U.S. at 390.

"* * * The right of free speech of a broadcaster * * * does not embrace a right to snuff out the free speech of others. * * *

* * * *

"* * * [A] licensee has no consitutional right * * * to monopolize a radio frequency to the exclusion of his fellow citizens. * * *

* * * *

"* * * It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. * * *" [12]

Of course, the *Red Lion* Court had to invoke the public's First Amendment interests for a narrow purpose only—to uphold legislative and administrative action already taken. It did not have to reach the issue, presented in these cases, of invoking those interests for a direct attack on broadcasters' policies approved by the Commission. However, the language used by the Court is significantly expansive. It spoke of a First Amendment "right" held by "the people as a whole." A constitutional "right" is hardly deserving of the name if it can function only to *permit* legislative and administrative action and if its content depends entirely upon the current policies of the legislative and executive branches. The First Amendment, after all, contains nothing analogous to the fifth section of the Fourteenth Amendment, authorizing Congress to enforce constitutional interests unenforceable by the courts.[13]

For many purposes, it is proper to consider broadcast licensees as "private" businesses. Yet, for purposes of

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[12] *Id.* at 387, 389, 390.

[13] On the effect of the specific language in the fifth section of the Fourteenth Amendment, *see Oregon* v. *Mitchell*, 400 U.S. 112 (1970); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). Of course, the Fourteenth Amendment does not apply to federal regulation of the broadcast industry, since no interference with the states is involved.

the First Amendment, "[o]wnership does not always mean absolute dominion." *Marsh* v. *Alabama*, 326 U.S. 501, 506 (1946). "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans* v. *Newton*, 382 U.S. 296, 299 (1966). The *Red Lion* Court itself commented on the impermissibility of "private censorship" and cited old doctrine that "'[f]reedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.'" [14] The reach of the First Amendment, therefore, depends not upon "public"—"private" technicalities, but upon more functional considerations. They are (1) the governmental involvement in or public character of a particular enterprise, and (2) the importance or suitability of that enterprise for the communication of ideas.[15]

The last few decades of court decisions expanding the concept of "state action" have focused on myriad indicia of governmental involvement and public character. Many

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[14] 395 U.S. at 392, quoting *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

[15] Most "state action" cases, of course, have been concerned with equal protection rights under the Fourteenth Amendment rather than with free speech rights under the First Amendment. However, the principle of governmental involvement developed therein has been applied equally well in the First Amendment context. *See, e.g., Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451 (1952); *Farmer* v. *Moses*, S.D. N.Y., 232 F.Supp. 154 (1964). The principle of "public character" may be found in decisions dealing directly with application of First Amendment rights to "private" entities. *See., e.g., Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Tanner* v. *Lloyd Corp., D. Ore.*, 308 F.Supp. 128 (1970); *Diamond* v. *Bland*, 91 Cal. Rptr 501, 477 P.2d 733 (1970). The importance and suitability of a particular place for the communication of ideas has been stressed in all of the cases cited above, as well as in all of the access-to-public forum cases, *see* Notes 40-43 *infra*.

of them are apparently applicable to the operations of the broadcast industry.[16] But we need stress only two more basic factors which, taken together, bring broadcast licensees well within the ambit of the First Amendment for the purposes of these cases. First, the general characteristics of the broadcast industry reveal an extraordinary relationship between the broadcasters and the federal government—a relationship which puts that industry in a class with few others.[17] It is one of "interdependence" and "joint participa[tion]." *See Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961). "[T]he [federal] regulatory system," it has been said, "is as much responsible for the existence of a broadcasting medium as the Bureau of Engraving is responsible for the existence of United States currency."[18] It has

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[16] Dissenting in the BEM case now under review, Commissioner Johnson dealt exhaustively with the Supreme Court's state action doctrine, isolating eight separate indicia of "state action." He argued very strongly that all eight indicia apply to broadcast licensees. *Business Executives Move for Vietnam Peace*, *supra* Note 1, 25 F.C.C.2d at 258-264. Because this highly analytical—one might say mechanical—approach runs the risk of reading Supreme Court opinions for more than they mean, we have chosen to paint with a broader brush. Ours is the approach which the Supreme Court seems in fact to have used in the past.

[17] In particular, broadcasting may be easily distinguished from the newspaper industry in terms of "state action." In two recent decisions, courts have held that newspapers are not subject to the First Amendment. *Associates & Aldrich Co., Inc.* v. *Times Mirror Co.*, 9 Cir., 440 F.2d 133 (1971); *Chicago Joint Board* v. *Chicago Tribune Co.*, 7 Cir., —— F.2d ——, 39 U.S. L. WEEK 2360 (December 17, 1970). While the governmental involvement in and public character of newspapers in surely less than that of broadcasting, we of course need express neither agreement nor disagreement with the cited decisions here.

[18] Pemberton, *The Right of Access to Mass Media*, in N. DORSEN (ed.), THE RIGHTS OF AMERICANS 277, 290 (1971). The Government is also directly responsible for the very existence of particular broadcasters. "[E]xisting broadcasters have often attained their present position because of their initial government selection in competiton with others * * *. * * * [Their present] advantages are the fruit of a preferred position conferred by the Government." *Red Lion Broadcasting Co.* v. *F.C.C.*, *supra* Note 7, 395 U.S. at 400.

long been recognized that the airwaves are "a limited and valuable part of the public domain," [19] leased out temporarily by the federal government which retains ultimate control over them.[20] Federal agency review and guidance of broadcasters' conduct is automatic, continuing and pervasive.[21] For broadcast licensees are considered the "proxies" or "fiduciaries" of the people.[22] Almost no other private business—almost no other regulated private business—is so intimately bound to government and to service to the commonweal.

A second and even more important factor is the *specific* governmental involvement in the broadcasters' action now under review here. All of the cases in which previous courts have characterized broadcasters as mere "private corporations" immune from First Amendment constraints, *see* text at page [A-11] *supra*, have involved direct suits against broadcast licensees. In the cases before us now,

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[19] *Office of Communication of United Church of Christ* v. *F.C.C.*, *supra* Note 8, 123 U.S.App.D.C. at 337, 359 F.2d at 1003.

[20] The licensing-out or delegation of governmental authority has been an element in some of the Supreme Court's most expansive state action decisions. *See Evans* v. *Newton*, 382 U.S. 296 (1966); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Smith* v. *Allwright*, 321 U.S. 649 (1944). The mere existence of a licensing or delegation relationship is not, of course, enough by itself to establish state action; licensed pharmacists cannot be equated with licensed broadcasters. The actual extent of governmental involvement and the public character of the enterprise in question remain the final tests of state action.

[21] The activities of a governmental regulatory agency have also been emphasized in at least one of the Supreme Court's expansive state action decisions. *See Public Utilities Comm'n* v. *Pollak*, *supra* Note 15, 343 U.S. at 462, *citing American Communications Ass'n* v. *Douds*, 339 U.S. 382, 401 (1950) ("[W]hen authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself.").

[22] *See Red Lion Broadcasting Co.* v. *F.C.C.*, *supra* Note 7, 395 U.S. at 394, 396; *Office of Communication of United Church of Christ* v. *F.C.C.*, *supra* Note 8, 123 U.S.App.D.C. at 337, 359 F.2d at 1003.

however, the Commission has given its imprimatur to the flat ban on editorial advertising. It specifically considered and specifically authorized the flat ban. Thus we are called upon to review not simply a private decision, but a decision by a government agency, a decision which must inevitably provide guidance for future broadcaster action.

There is ample authority for the principle that specific governmental approval of or acquiescence in challenged action by a private organization indicates "state action." [23] Indeed, in a case similar to ours the Supreme Court held that a private bus company franchised by the federal government and regulated by the District of Columbia Public Utilities Commission could be subject to First Amendment constraints. It emphasized the specific regulatory acquiescence in the challenged action of the bus company:

> "* * * In finding [state action] we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. We do, however, recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Com-

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[23] The Supreme Court has said that "action of state courts and judicial officers in their official capacities is to be regarded as action of the State * * *." *Shelley* v. *Kraemer*, 334 U.S. 1, 14 (1948). *See New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 DUKE L. J. 219, 227-230. *See also* this court's discussion of the *Shelley* principle—which surely must apply to actions of a federal administrative agency specifically approving private action—in *Edwards* v. *Habib*, 130 U.S.App.D.C. 126, 397 F.2d 687 (1968). Specific governmental acquiescence, as well as specific approval, has also been a focus of Supreme Court state action decisions. *See Marsh* v. *Alabama*, *supra* Note 15, 326 U.S. at 507 & n.4, 509; *Burton* v. *Wilmington Parking Authority*, *supra* Note 20, 365 U.S. at 725.

> mission of the District of Columbia which is an agency authorized by Congress. We rely particularly upon the fact that that agency, pursuant to protests against the [challenged action], ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby. * * *"

Public Utilities Commission v. *Pollak*, 343 U.S. 451, 462 (1952). (Footnote omitted.)

Broadcasting's importance and suitability for communication of ideas need not be labored. Mere presence of large and appropriate audiences (and thus opportunities for effective communication) has sometimes been emphasized by the courts to show the relevance of First Amendment protections.[24] In *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), for example, the Supreme Court held that a privately owned shopping center was an appropriate place for the "speech" of labor union picketers. It stressed "[t]he large-scale movement of the country's population from the cities to the suburbs [that] has been accompanied by the advent of the suburban shopping center * * *." *Id.* at 324. With this demographic change, the "speech" that once took place on the public streets around downtown shopping areas must be allowed to move to privately owned parking areas in the suburbs, for that is where the relevant audiences now are. The technological and cultural changes connected to the current preeminence of the broadcast media as our primary means of communication are no less striking. The soap box orator and the

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[24] *See, e.g., Wolin* v. *Port of New York Authority*, 2 Cir., 392 F.2d 83, 90-91 (1968) ("The propriety of a place for use as a public forum * * * [may be established if] the place is where the relevant audience may be found."). Of course, the cases before us involve the right to speak on a *medium* of communication, not in a particular *place*. Thus many of the considerations are different; but the basic concern with the ability to reach the relevant audience applies in both situations.

leafleter are becoming almost obsolescent; their Saturday afternoon audiences have increasingly moved indoors—in front of their television sets.[25]

Moreover, unlike most of the private entities held to be subject to First Amendment constraints, the broadcast media are specifically dedicated to communication. They function as both our foremost forum for public speech and our most important educator of an informed people. In a populous democracy, the only means of truly mass communication must play an absolutely crucial role in the processes of self-government and free expression, so central to the First Amendment. That can be said of almost no other "private" enterprise.

IV

Broadcast licensees, then, serve not only as "speakers" but also as administrators of a highly valuable communications resource, subject to First Amendment constraints. Their dual role demands that their own constitutional interests in free speech coexist with those of the general public. But what are the dimensions of the public's First Amendment interests in the operation of radio and television? And how do they apply to the issue of editorial advertising?

It is particularly important that these cases deal only with the public's First Amendment interests in broadcasters' allocation of advertising time. They deal only with time relinquished by broadcasters to others; petitioners argue only that, in relinquishing that time, broadcasters must not discriminate against protected expression. In normal programming time, closely controlled and edited by broadcasters, the constellation of constitutional interests would be substantially different. In news and

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[25] The Supreme Court has noted that broadcast "technology * * * supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news * * *." *Red Lion Broadcasting Co.* v. *F.C.C.*, *supra* Note 7, 395 U.S. at 386 n.15.

documentary presentations, for example, the broadcasters' own interests in free speech are very, very strong.[26] The Commission's fairness doctrine properly leaves licensees broad leeway for professional judgment in that area. But in the allocation of advertising time, the broadcasters have no such strong First Amendment interests. *Their* speech is not at issue; rather, all that is at issue is their decision as to which other parties will be given an opportunity to speak.

Though the broadcasters themselves have no substantial First Amendment interest in the allocation of advertising time, we might expect that the interest of members of the public—potential advertisers—would be quite strong. However, the Commission and the broadcaster-intervenors have argued just the opposite. They contend that the public's constitutional concerns do not extend to advertising time. Thus we must decide whether the substantial block of the broadcast day devoted to advertising is but a vacuum, devoid of First Amendment constraints, in the midst of a medium powerfully affected by those constraints—a desert in the midst of an oasis.

The Commission and intervenors work from the following premise. They define the public's overall constitutional interests in the operations of radio and television quite narrowly. The public's only interest, they suggest, is as viewers and listeners—not as speakers. They cite to us the *Red Lion* Court's mention of "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences" over the broadcast media.[27] And they read that statement to set forth not only *an* interest of the public, but the *only* interest of the public.

Working from that premise, the Commission and intervenors contend that the public already receives "suitable

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[26] *See id.* at 396.

[27] *Id.* at 390.

access" to controversial views on normal programming time. Application of the fairness doctrine's requirement of full and fair coverage of public issues in non-advertising time, they suggest, ensures that all views on these issues will in fact be presented. They assume that editorial advertising adds nothing new to the debate. The fairness guarantee alone, they say, is enough to eliminate petitioners' claim on advertising time—and enough to satisfy the First Amendment. We disagree.

Surely the public's interest in free access to the full spectrum of ideas and controversial views on radio and television is highly important. The right to receive ideas and information is deeply rooted in First Amendment law.[28] The *Red Lion* Court stressed that right, since it was the one primarily relevant to the fairness doctrine rules at issue in the case. But we do not believe that the *Red Lion* decision makes the goal of an informed public the exclusive First Amendment interest constraining broadcasters. Certainly the Supreme Court has done so in no other context.

The public has a First Amendment interest in the mode or manner—as well as the content—of public debate aired on the broadcast media. The *Red Lion* Court itself stated specifically that "[i]t is the purpose of the First Amendment to preserve an *uninhibited* marketplace of ideas [in the broadcast media]."[29] This court, similarly, has said that the Commission is obliged to administer the airwaves "in such a manner that * * * debate on public issues is 'uninhibited, robust and wide-open.'" *National Ass'n of Theatre Owners* v. *F.C.C.*, 136 U.S.App.D.C.

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[28] *See Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); *Lamont* v. *Postmaster General*, 381 U.S. 301, 307-308 (1965) (Mr. Justice Brennan, concurring); *Martin* v. *City of Struthers*, 319 U.S. 141, 143 (1943). The "right to receive," however, has not been considered the central First Amendment interest, and never the only First Amendment interest.

[29] 395 U.S. at 390. (Emphasis added.)

352, 365, 420 F.2d 194, 207 (1969). The reference to "uninhibited" debate is, of course, borrowed from the Supreme Court's decision in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). The Court there extended First Amendment protection to some forms of libel on public officials. It made clear that the Amendment's concern extends beyond the mere fostering of speech whose content will properly inform the public. The *New York Times* decision establishes a strong First Amendment interest in vigorous, "wide-open" public debate.

Furthermore, we must take note of a third—but, perhaps, most important—First Amendment interest. That is the interest of individuals and groups in effective self-expression. The *Red Lion* Court did say that "it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." [30] For, as it pointed out, broadcast time is necessarily limited. But the limited nature of broadcast time does not dictate that the individual and group interest in self-expression be brushed aside entirely; it allows for a reasonably regulated, "abridgeable" right to speak. The First Amendment values of individual self-fulfillment through expression and individual participation in public debate have long been recognized.[31] We all have an interest in speaking up ourselves as well as in hearing others. It is too late to argue that the First Amendment protects ideas but not an individual's interest in expressing them and doing so in his own way.

We conclude, then, that the public's First Amendment interests constrain broadcasters not only to provide the full spectrum of viewpoints, but also to present them in an uninhibited, wide-open fashion and to provide opportu-

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[30] *Id.* at 388.

[31] *See, e.g.*, T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4-7 (Vintage ed. 1967).

nity for individual self-expression.[32] How do these three First Amendment interests relate to a more specific interest in the airing of editorial advertisements? The answer emerges when we understand the special importance of advertising time to our system of free expression. First, the initial decision to produce an editorial advertisement is in the hands of members of the public. The initiative to present a particular view does not have to come from a member of the broadcaster's staff. Second, a paid advertisement is basically controlled and edited by the advertiser. He is allowed to present his views in a fashion chosen by himself. If an individual is interviewed for a news program, he may expect his comments to be abbreviated and edited; reporters' commentary will qualify what he has to say. For it is the broadcasters' responsibility to be objective, to condense issues into available time for presentation, and to play up or play down views according to the *broadcaster's* opinion of what is important and interesting. But when an individual or group buys time to say its piece, the crucial controls are in its own hands. Editorial advertising is thus a special and separate mode of expression, not simply a duplication of other expression on the same medium.[33]

The importance of initiative and control to the First Amendment interests in wide-open debate and individual self-expression should be obvious. Vigorous, free expression is promoted when members of the public have *some*

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[32] Of course, all three of these interests apply to non-advertising time as well as to advertising time. The Commission, in fact, has encouraged broadcasters to present conflicting views through partisan voices as well as through predigested commentary. *See Democratic National Committee, supra* Note 1, 25 F.C.C.2d at 222-223. However, as we make clear in text, the selective, edited presentation by the Government's licensee of partisan voices on news shows, for example, does not erase the *special* advantages of allowing self-selected partisan voices on advertising time.

[33] *See* text at pages [A-25 - A-26] & Note 37 *infra*. *See also* Note, *A Fair Break for Controversial Speakers: Limitations of the Fairness Doctrine and the Need for Individual Access*, 39 GEO. WASH. L. REV. 532, 557-560 (1971).

opportunity to take the initiative and editorial control into their own hands on the broadcast media. It has traditionally been thought that the best judge of the importance of a particular viewpoint or issue is the individual or group holding the viewpoint and wishing to communicate it to others. In the First Amendment area, our best guarantee has always been a "free market" in which partisans who feel strongly on particular issues may decide on their own to speak out and to speak out in their own way. The present system, allowing a flat ban on editorial advertising, conforms instead to a paternalistic structure in which licensees and bureaucrats decide what issues are "important," how "fully" to cover them, and the format, time and style of the coverage.

Even if broadcasters were to succeed in presenting a full spectrum of viewpoints and partisan spokesmen on non-advertising time, their retention of *total* initiative and editoral control is inimical to the First Amendment. The importance of fair, objective and full treatment of controversial issues on normal programming cannot be doubted. But, as the Supreme Court has said in the context of classroom debate, "supervised and ordained discussion" is not enough. *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969). "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967). In other words, there is always a strong First Amendment interest in opening up channels for more spontaneous, self-initiated, self-controlled expression.[34]

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[34] We are cognizant of current proposals to reform the Commission's fairness doctrine and invigorate its enforcement, so lackluster in the past. We commend the Commission's consideration of new rules to "encourage and implement" presentation of opposing viewpoints by reemphasizing the obligation to "seek out"

Even in terms of the public's First Amendment interest emphasized by the Commission and intervenors—the interest of "viewers and listeners" in passive access to the full spectrum of viewpoints on radio and television—editorial advertising plays an important role. The concept of "full" coverage of "controversial" issues "of public importance" is vague to say the least, and leaves much

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controversial issues. *Obligations of Broadcast Licensee Under the Fairness Doctrine*, 35 FED. REG. 7820 (1970). But, as the Commission says, the proposed rules would be but a "modest * * * step in promoting access to the media." *Id.* at 7821. They go little beyond the present obligation to give "full" coverage to controversial issues. Such an obligation is inherently difficult to define and enforce. At best, the Commission can evaluate only the *general* willingness of a licensee to "seek out" issues and glaring examples of noncoverage of obviously important issues. The Commission cannot be expected to engage licensees in fine debates over coverage of less obviously life-or-death issues. But the fundamental point—the point we emphasize—is that no matter how "fully" controversial issues might be covered in a perfect broadcasting world, the basic initiative and control remains with the licensee. Because there is not even a partial "free market" opening to the public at large, the crucial First Amendment interests in decentralized initiative and control go unsatisfied.

We realize that there is another possible, but purely speculative, reformation of the fairness doctrine now under consideration which might be supposed to obviate the need for a measure of "free market" access to advertising time. It has been proposed that licensees be required to provide self-edited advertising time to groups or individuals under the fairness doctrine only when a commercial advertiser has already taken a controversial position in his broadcast messages. Such an approach has been taken regarding cigarette advertisements, though that case was said to be extraordinary and not to establish a general precedent. *Banzhaf* v. *F.C.C.*, 132 U.S.App.D.C. 14, 405 F.2d 1082 (1968). But even if that principle were made to apply generally, it would leave the initiative solely in the hands of commercial advertisers: the only issues on which noncommercial groups and individuals could speak through editorial advertisements would be those issues which commercial advertisers had already chosen to raise themselves. Allowing such a narrow group, motivated largely by business profit, to set the agenda for editorial advertising is unconscionable and contrary to First Amendment precepts. It is crucial that noncommercial groups and individuals have the same rights of initiative as commercial advertisers.

to the broadcasters' discretion (and possible oversight).[35] Assuming that broadcasters are sometimes fallible, the goal of a fully informed public is best attained by opening of outlets for members of the public to supplement the licensees' assessments of "importance," "controversiality" and "full" coverage. The Commission's and intervenors' argument might be somewhat stronger if it were designed to support a partial ban on editorial advertising concerning issues and views which have *in fact* been substantially aired on normal programming time.[36] The argument is unconvincing, however, in support of a flat, *per se* ban on any and all editorial advertisements.

Moreover, even if "antiwar views," for example, have in fact been presented on news and interview shows, it is not *necessarily* clear that a particular antiwar editorial advertisement would add nothing to the public's information and understanding. "Viewpoints" cannot be so neatly and infallibly catalogued as the Commission would have us believe. Self-expression and public debate are much more subtle phenomena; matters of style and intensity of feeling are important components.[37] Again,

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[35] The guarantees of full and fair coverage have proved particularly difficult to define and enforce in the past. They have taken on effective meaning only in the most extreme cases of broadcaster irresponsibility. For a depressing critique of the Commission's apparent inability to enforce its own standards, *see* Cox & Johnson, *Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study*, 14 F.C.C.2d 1 (1968).

[36] Even then, however, the special attributes of editorial advertising would not be eliminated by the broadcaster's own coverage. *See* text at pages [A-21 - A-23] *supra* & pages [A-25 - A-26] *infra*.

[37] In *Lee* v. *Board of Regents of State Colleges*, W.D. Wis., 306 F.Supp. 1097 (1969), *affirmed*, 7 Cir., 441 F.2d 1257 (1971), the court held that a school newspaper was obliged under the First Amendment to print antiwar editorial advertising, even though antiwar views could be printed in the newspaper's news and letters-to-the-editor columns. The court stressed the qualitative—and valuable—difference in expression of views through an editorial advertisement. "It is readily apparent," it said, "that a paid advertisement can be cast in such a form as to command much greater attention than a letter to the editor. Large type, photographs,

an across-the-board ban on editorial advertisements—leaving the quality of public debate in the control of one licensee, supplemented by no other autonomous inputs—may well ignore opportunities to enliven and enrich the public's overall information.

We recognize, of course, that the onesidedeness and private editing of particular "spot" editorial advertisements may in the end steer viewers and listeners away from the "truth" by distorting complex issues. Being brief, these "spot" messages—no less than normal broadcast news coverage—may not canvass all possible arguments or develop all possible implications of the position they espouse. But that does not mean that they are unprotected by the First Amendment. Our Constitution protects many forms of misleading and overly simplified political expression in order to ensure robust, wide-open debate. "[N]either factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct * * *." *New York Times Co.* v. *Sullivan, supra*, 376 U.S. at 273. Nor does the brevity of the criticism. We must, then, be very, very slow to judge any sort of speech on public issues worthless. The marketplace of ideas protected by the First Amendment, after all, is not governed by the tastes and intellectual standards of the universities or the broadcast newsroom —or even of judicial chambers.

We conclude, therefore, that the fairness doctrine's goal of full and fair coverage of issues on normal programming time does not eliminate the public's interest in a further, complementary airing of controversial views during advertising time. We must concur in the Supreme Court's only recorded comments on constitutional

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repeated publication and full pages of space are some of the modes of expression available in an editorial advertisement that might not be available in a letter to the editor." *Id.* at 1101. Another court has come to the same result in a newspaper editorial advertising case. *Zucker* v. *Panitz*, S.D. N.Y., 299 F.Supp 102 (1969). *See* text at pages [A-27 - A-29] *infra*.

protection for editorial advertising—comments made in the context of newspapers, like broadcasting a medium which may be expected, if not required, to present the various sides of public issues in its non-advertising space. The Court said that editorial advertisements, unlike commercial advertisements,[38] are of fundamental First Amendment concern, since they deal with political questions. And it protected them from libel law attack to the same extent as the newspapers' own editorial columns, for

> "[a]ny other conclusion * * * might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. * * * The effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.' * * *"

New York Times Co. v. *Sullivan, supra,* 376 U.S. at 266.

V

We come now to the aspect of the broadcasters' policy which, petitioners say, trenches on the First Amendment interest in editorial advertising. The constitutional defect of that policy is somewhat ironic. The *New York Times* Court made clear that the fact distinguishing fully protected editorial advertising from less fully protected commercial advertising is that the former deals with controversial public issues. Indeed, the political nature of editorial advertising places it near the core of the First Amendment. However, the very characteristic which affords it strict constitutional protection is also the characteristic causing the broadcasters' challenged

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[38] Commercial advertising—indeed, any sort of commercial speech—is less fully protected than other speech, because it generally does not communicate ideas and thus is not directly related to the central purpose of the First Amendment. *See Breard* v. *City of Alexandria,* 341 U.S. 622 (1951); *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942).

policy to single it out and exclude it from the airwaves. That, we believe, is the crucial aspect of these cases.

It is important to note that petitioners do not attack the exclusion of editorial advertising by broadcasters who accept no advertisements whatever.[39] We do not have to decide whether the broadcast medium inherently amounts to a "public forum" on the order of public streets or parks or meeting halls or even bus terminals.[40] We leave open the possibility that broadcasters may constitutionally relinquish no time at all for advertising of any sort. For the issue in these cases is the permissibility of discrimination, within a given block of advertising time, against "controversial" speech and in favor of commercial and "noncontroversial" speech. We deal here with a forum that already has been opened up by the licensees themselves, opened up for direct broadcast presentations by members of the public.

Fortunately, we do not write on a clean slate in this area. Six courts have confronted discriminations among types of speech like the one challenged here. Every one of them—four federal courts and two state supreme courts—has held that once a forum, subject to First Amendment constraints, has been opened up for commercial and "noncontroversial" advertising, a ban on "controversial" editorial advertising is unconstitutional unless

[39] DNC's position is somewhat ambiguous. The ruling which it requested from the Commission would, by its terms, apply to all broadcasters, whether or not they accept any advertising. *See* text at page [A-6] *supra*. However, on appeal DNC's arguments have been focused entirely on broadcasters who do already accept noncontroversial advertising. The interests of particular licensees in keeping all advertising off the air were not explored before the Commission or before this court—for example, an all music station may have a very substantial interest in broadcasting no paid announcements. Because the special issues relating to such licensees were not presented here, we do not decide them.

[40] *See, e.g., Schneider* v. *State*, 308 U.S. 147 (1939); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *Wolin* v. *Port of New York Authority*, *supra* Note 24. *See generally* Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 SUP. CT. REV. 1.

clearly justified by a "clear and present danger." *Lee* v. *Board of Regents of State Colleges*, W.D. Wis., 306 F. Supp. 1097 (1969), *affirmed*, 7 Cir., 441 F.2d 1257 (1971); *Zucker* v. *Panitz*, S.D. N.Y., 299 F.Supp. 102 (1969); *Kissinger* v. *New York City Transit Authority*, S.D. N.Y., 274 F.Supp. 438 (1967); *Hillside Community Church, Inc.* v. *City of Tacoma, Wash.*, 455 P.2d 350 (1969); *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal.Rptr 430, 434 P.2d 982 (1967). We join this unbroken line of authority.

First Amendment doctrine governing access to forums for communication has been elaborated often in recent years. The essential test is an exercise in balancing, though weighted in favor of First Amendment values.[41] On one hand, the court must assess the constitutionally protected interest in the particular expressive activity in the particular forum. On the other hand, it must assess the importance of other uses of the forum which may be threatened and the extent to which they actually will be disrupted. Access may be denied only if the disruption caused by a particular type of expression (*e.g.*, public speaking, marching, picketing) clearly overrides the "preferred" interest in free speech. Thus there is some right of access by demonstrators to state capitol grounds [42] but not to a jailyard.[43]

Ordinarily, courts have to make the basic balancing judgment on their own. However, when the administra-

[41] Most of the cases, other than those cited above in text, have involved access to particular places in order to perform expressive activities such as speaking, leafleting, or demonstrating in some fashion. For general discussions of the cases and the principles applied, *see* H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT (paper ed. 1965); Note, *Regulation of Demonstrations*, 80 HARV. L. REV. 1773 (1967). There is no reason why the general principles applied in cases involving access to *places* should not apply to our cases involving access to a particular *medium* of expression. *See* Note 24 *supra*.

[42] *Cox* v. *Louisiana*, 379 U.S. 536 (1965).

[43] *Adderley* v. *Florida*, 385 U.S. 39 (1966).

tor of a forum has determined to grant access to some speakers or some picketers, he has implicitly made that basic judgment himself. When some public speaking is allowed in a park, the park's administrator has determined that the normal and proper functions of the park will not be excessively harmed by public speaking. If he then attempts to deny access to other public speakers he cannot be heard to claim the opposite. The burden is on him to show some very substantial factor distinguishing the disruption that would cause from that caused by the speaking or picketing already allowed.

The same principle applies to broadcasters who have opened their forum to commercial speech but would close it to controversial political speech. By opening up a forum for some paid presentations, independently edited and controlled by members of the public, the broadcasters have waived any argument that advertising is inherently disruptive of the proper function of their stations. The exclusion of only one sort of advertising—which we have shown to have great First Amendment value—is then highly suspect, a *prima facie* constitutional violation. To justify the exclusion, there must be a substantial factor distinguishing the disruptive effect of editorial advertising from that of commercial advertising.

The content of the idea which the excluded speakers seek to promote is—emphatically—*not* permitted as a distinguishing factor in itself. Indeed, the existence of an exclusionary discrimination apparently based on the content of ideas presents an additional, or greatly heightened, *prima facie* constitutional violation. Both free speech and equal protection principles condemn any discrimination among speakers which is based on what they intend to say.[44] If the First Amendment prohibits any-

[44] For discussions of the First Amendment-equal protection intersection, *see* Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1482, 1492-1497 (1970); Kalven, *supra* Note 40, 1965 SUP. CT. REV. at 29-30; Van Alstyne, *Political Speakers at Universities: Some Constitutional Considerations*, 111 U. PA. L. REV. 328, 337-339 (1963).

thing at all, it must be a censorial discrimination among ideas. And since First Amendment rights have been held to be "fundamental rights" triggering the strict standard of review under equal protection principles, *Williams* v. *Rhodes*, 393 U.S. 23, 30-31 (1968), it is doubly clear that the burden of justifying any apparent discrimination is very great indeed.

At least 20 years ago, the Supreme Court began condemning discriminations among different exercises of the same type of expression. *Fowler* v. *Rhode Island*, 354 U.S. 67 (1953); *Niemotko* v. *Maryland*, 340 U.S. 268, 272-273 (1951). Both cases involved access to a forum already opened to others. More recently, the Court in *Cox* v. *Louisiana*, 379 U.S. 536 (1965), invalidated a state regulation that permitted labor picketing but not civil rights picketing. In his concurrence, Mr. Justice Black stated that this sort of discrimination is "censorship in a most odious form" and violates both the First Amendment and the equal protection clause. *Id.* at 581. Similarly, in *Adderley* v. *Florida*, 385 U.S. 39 (1966), the Court upheld a ban on demonstrations in a jailyard, but was careful to note that "[t]here is not a shred of evidence in this record * * * [the demonstrators were excluded] because the sheriff objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest." *Id.* at 47.

No doubt a discrimination against all controversial speech—such as we face in these cases—is somewhat less "odious" than a discrimination among different controversial viewpoints on particular issues. But it is a form of censorship just the same.[45] It is a favoritism toward

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[45] In *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Rptr 430, 434 P.2d 982, 986 (1967), the California Supreme Court came to the same conclusion as we do on this issue, saying:

> "* * * The vice is not that the district has preferred one point of view over another, but that it chooses between classes of ideas entitled to constitutional protection, sanctioning the

the *status quo* and public apathy and, in these cases, a favoritism toward bland commercialism.[46] Such favoritism flies in the face of the First Amendment, whose central purpose is to protect and promote controversy, "uninhibited, robust and wide-open," on public issues.

Moreover, it is by no means clear that a broadcasters' ban on "controversial" advertising does not impermissibly open the door to a *sub rosa* discrimination *among* controversial ideas. The term "controversial" is extraordinarily vague. Some advertisements may not be deemed "controversial"—and may not even be "controversial" for purposes of the fairness doctrine [47]—but may still express ideas, the negative of which would surely be labeled "controversial." [48] Ads for Radio Free Europe or Army re-

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expression of only those selected, and banning others. Thus the district's regulation exercises a most pervasive form of censorship.

"* * * [T]he district's policy * * * affords total freedom of the forum to mercantile messages while banning the vast majority of opinions and beliefs extant which enjoy First Amendment protection because of their noncommercialism. No statistical data is required to demonstrate that in the totality of man's communicable knowledge, that which bears no relationship to material value preponderates."

The Supreme Court of Washington specifically adopted this view in *Hillside Community Church, Inc.* v. *City of Tacoma*, Wash., 455 P.2d 350, 353 (1969).

[46] Commissioner Johnson commented in his dissent that broadcasters "have created a system in which immediate access is granted to one, privileged class of applicants: the commercial peddler of goods and services. * * * We have an individual right of access, all right, but only for hucksters of industrial garbage." *Democratic National Committee, supra* Note 1, 25 F.C.C.2d at 233.

[47] *See Banzhaf* v. *F.C.C.*, 132 U.S.App.D.C. 14, 405 F.2d 1082 (1968); *Green* v. *F.C.C.*, —— U.S.App.D.C. ——, —— F2d —— (Nos. 24470 & 24516, decided June 18, 1971).

[48] In *Wirta* v. *Alameda-Contra Costa Transit District, supra* Note 45, 434 P.2d at 987, the California Supreme Court made the same point very forcefully, and provided several telling examples:

[Footnote continued on Page A 33]

cruiting, for example, may be allowed unanswered on the air, while ads calling the notion of the "free world" a sham or ads calling the Army a threat to democracy would be banned entirely. The line between ideological and nonideological presentations is an almost impossible one to draw. All too often in our society one particular ideology—that of passivity, acceptance of things as they are, and exhaltation of commercial values—is simply taken for granted, assumed to be a nonideology, and allowed to choke out all the rest.[49]

Thus the editorial advertising ban, particularly when licensees accept advertising generally, establishes an unmistakable infringing of First Amendment liberties. The Commission and the broadcasters, then, bear a very heavy burden of justification. Whether we require a "compelling" justification, an "overriding" justification, or a "clear and present danger" is relatively unimportant.

VI

It being established that there is a strong and specific First Amendment interest in editorial advertising and that the policies discriminatorily barring such expression work a *prima facie* violation of constitutional principles, we must consider the countervailing considerations raised by the Commission and the broadcaster-intervenors. In order to justify the policy at issue, they must show some very substantial harm that would be caused by acceptance

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[48] [Continued]

"* * * A lumber company may advertise its wood products, but a conservation group cannot implore citizens to write to the President or Governor about protecting our natural resources. An oil refinery may advertise its products, but a citizens' organization cannot demand enforcement of existing air pollution statutes. An insurance company may announce its available policies, but a senior citizens' club cannot plead for legislation to improve our social security program."

[49] *See generally* C. WAXMAN (ed.), THE END OF IDEOLOGY DEBATE (1969).

of editorial advertising—a sort of harm great enough to override the First Amendment interests at stake and a sort of harm not already involved in the acceptance of commercial and "noncontroversial" advertising. Only such a showing could convince us that the ban on editorial advertisements is supported by sufficient countervailing values and is not based solely on the content of the ideas conveyed.

The Commission and intervenors have begun from the assumption that our holding for petitioners would deprive broadcast licensees of their highly prized editorial independence and control over their frequencies, giving editorial advertisers a *right* to air time which commercial advertisers do not presently have. They have argued that petitioners seek the right to "grab the mike" from broadcasters' hands.[50] The result, they say, would be a threefold disaster. First, they foresee " 'a return to the chaotic situation of radio's early days' " [51] when too many hands grabbing for too few mikes made successful broadcasting impossible. Second, they argue that compulsory acceptance of editorial advertising would allow a few rich individuals or groups to buy up great blocks of time to purvey views on only one side of important issues, thus grossly unbalancing the broadcast station's treatment of those issues. And third, they point out that broadcasters compelled to accept editorial advertisements on one side of an issue would then be required by the fairness doctrine to accept at least some advertisements on the other side —free of charge if necessary. Provision of such free advertising time, they say, would cut into the broadcasters' revenues and might bring financial collapse.

The arguments of the Commission and intervenors fall well short of the mark. The reason is that they have

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[50] Statement of attorney for intervenor Columbia Broadcasting System at oral argument before this court.

[51] Brief for the Commission in Case No. 24,537 at p. 12.

apparently misunderstood the narrowness of the issue here. All that we are considering is the permissibility of a total, flat ban on editorial advertising. All petitioners ask is that broadcasters be required to accept *some* editorial advertising. They do not advocate an absolute right to air their advertisements. As the *Red Lion Court* made clear, there could not be any such absolute right because advertising time, like all broadcast time, is severely limited. *See* text at page [A-21] *supra.* Under the Communications Act, broadcasters are not "common carriers" obliged to accept any advertising message that is submitted.[52] And petitioners do not argue that they should be. What petitioners do argue is that editorial advertisements should at least be considered and that some should be aired.

Such a modest reform would not substantially undermine broadcasters' editorial control over their frequencies. For broadcasters would retain full latitude to control the content of their programming. Their editorial control over non-advertising time would not be disturbed whatever. All that would be affected is their allocation of advertising time—an area in which *editorial* control over content has never been of major importance. The interest in deciding which advertisements to accept is not as great as in deciding what public issues to cover and how to cover them on news presentations, for example. *See* text at page[s] [A-18 - A-19], *supra.* It surely cannot be

[52] 47 U.S.C. § 153(h) (1964). The Commission and intervenors argue that this "common carrier" provision would be declared unconstitutional if we were to decide for petitioners in these cases. That, of course, is absolutely incorrect. The Commission and intervenors also point to a part of the Communications Act providing that if a station permits one candidate for office to use its facilities, it must then permit others equal time, but providing also that "[n]o obligation is imposed upon any licensee to allow the use of its station by any such candidate." 47 U.S.C. § 315(a) (1964). This statutory provision squares perfectly with our holding that a broadcaster is not necessarily obliged to provide any time for advertisements, but that if he does sell some advertising time he may not totally exclude editorial advertising.

equated, as the Commission and intervenors suggest, with the interest of law review editors in deciding what articles to publish. *See Avins* v. *Rutgers, State University of New Jersey*, 3 Cir., 385 F.2d 151 (1967), *cert. denied*, 390 U.S. 920 (1968). A broadcaster traditionally is not nearly as involved in the preparation and editing of advertisements as a law review staff is in the preparation and editing of articles.

Within the affected block of advertising time, neither chaos nor anything approaching chaos would follow the modest reform at issue. For, again, broadcasters would retain wide-ranging control. It is well established in First Amendment law governing access to forums that "reasonable regulations" may be promulgated and enforced to limit the exercise of free speech.[53] At the least, there may be regulations determining the time, place and manner of speech. They may not be used to stifle speech, but they are absolutely necessary to see that too many groups speaking at once do not drown out one another or trench overly much on the normal uses to which the forum is put by the public in general. The same principle applies to broadcasters' methods for allocating advertising time. All that petitioners condemn here are regulations providing that public issue advertising may be aired "at no time, in no place and in no manner" over the broadcast media.

Clearly, for example, broadcasters are entitled to place an outside limit on the total amount of editorial advertising they will sell. To fail to impose some such limit would be to deny the public the other sorts of programming which it legitimately expects on radio and television. Similarly, "reasonable regulation" of the placement of advertisements is altogether proper. No advertiser has a right to air his presentation at any particular point

[53] *See, e.g., Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 320 (1968); Note, *supra* Note 15.

in an evening's programming. Nor does he have a right to clog a particular time segment with his messages. A relegation of all editorial advertising to non-"prime time" or any other major discrimination in the placement of editorial advertisements would no doubt go too far. But there is still room for broad exercise of the broadcasters' discretion.

We need not define the precise control which broadcasters may exercise over editorial advertising. Rather, the point is that by requiring that *some* such advertising be accepted, we leave the Commission and licensees broad latitude to develop "reasonable regulations" which will avoid any possibility of chaos and confusion. The spectre of chaos and "mike grabbing" raised by the Commission and intervenors here is, as petitioners say, a "bogus issue." Broadcasters, after all, have dealt quite successfully with the scheduling problems involved with commercial advertising. We require only that noncommercial advertisers be treated in the same evenhanded way. Although many broadcasters already do allow editorial advertisements on the air, we have not been shown one reason, drawn from their experience, to suggest that chaos has resulted.

Beyond the mistaken suggestion of administrative apocalypse, the Commission and intervenors have raised a more plausible and important claim, involving the danger that a few individuals or groups might come to dominate editorial advertising time. Of course, the mere fact that wealthy people may use their opportunities to speak more effectively than other people is not enough to justify eliminating those opportunities entirely. It takes more money to operate a magazine or newspaper—or, for that matter, a broadcast station—than to buy a segment of time for an editorial advertisement. Yet we are not reluctant to provide strict First Amendment protection for the operators of magazines, newspapers and broadcast stations. The real problem, then, is not that editorial ad-

vertising will cost money, but that it may be dominated by only one group from one part of the political spectrum. A onesided flood of editorial advertisements could hardly be called the "robust, wide-open" debate which the people have a right to expect on radio and television.

Again, however, invalidation of a flat ban on editorial advertising does not close the door to "reasonable regulations" designed to prevent domination by a few groups or a few viewpoints. Within a general regime of accepting *some* editorial advertisements, there is room for the Commission and licensees to develop such guidelines.[54] For example, there could be some outside limits on the amount of advertising time that would be sold to one group or to representatives of one particular narrow viewpoint. The licensee should not begin to exercise the same "authoritative selection" in editorial advertising which he exercises in normal programming. *See* text at pages [A-22 - A-23] *supra*. However, we are confident of the Commission's ability to set down guidelines which avoid that danger.

We are no less confident of its ability to deal reasonably with the final problem it has raised—that relating to licensees' fairness obligations. Invalidation of a flat ban on editorial advertising, of course, leaves the Commission the power to require that if editorial advertisements are accepted on one side of an issue, then broadcasters must also accept at least some advertisements on the other side of the issue, free of charge if necessary. *See Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963). The result of such a reasonable regulation, however, need not be financial disaster. Indeed, it is incredible that the Commis-

[54] In the context of regulating demonstrations or picketing, guidelines which limit access because the same or similar groups had already had substantial access would be unusual and perhaps impermissible. However, the interest in maintaining some degree of balance on the broadcast media is particularly great. And "the characteristics of news media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co. v. F.C.C.*, *supra* Note 7, 395 U.S. at 386.

sion would enforce a rule so rigid that licensees would be driven out of business.[55] If the obligation to provide some free time for answering editorial advertisements were shown to threaten actual financial harm to particular broadcasters, the Commission could make necessary adjustments.[56]

We conclude that none of the spectres raised by the Commission and intervenors—spectres of chaos, grossly unbalanced programming and financial disaster—is enough to justify a flat ban on editorial advertising. What real problems there are may be dealt with while the acceptance of *some* editorial advertisements is required. The keynote must be a scheme of reasonable regulation, administered by the licensee and guided by the Commission. At least in the past, the Commission has not considered this task so impossible. Twenty-five years ago it decided a case in which a union charged that a broadcaster was violating free speech rights by refusing to sell program time for the airing of controversial views. The Commission stated:

> "* * * The spirit of the Communications Act of 1934 requires radio to be an instrument of free speech, subject only to general statutory provisions imposing upon the licensee the responsibility of operating its station in the public interest. * * *
>
> "* * * No single or exact rule of thumb for providing time, on a non-discriminatory basis, can be

[55] We note that the Commission's requirement of free time for antismoking was administered generously toward the financial concerns of licensees and, indeed, few broadcasters seem to have been deterred from accepting cigarette commercials as a result. *See National Broadcasting Co., Inc.*, 16 F.C.C.2d 947 (1969).

[56] *See* Note, *Fairness Doctrine: Television as a Marketplace of Ideas*, 45 N.Y.U. L. REV. 1222, 1249 (1970). We must be somewhat skeptical of the talk about financial disaster. For, according to Commissioner Johnson, television broadcasters at least "*average* a 90 to 100 percent return on tangible investment annually." N. JOHNSON, HOW TO TALK BACK TO YOUR TELEVISION SET 65 (1969). (Emphasis in original.)

> stated for application to all situations which may arise in the operation of all stations. The Commission, however, is of the opinion that the operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues and that only charitable organizations and certain commercial interests may solicit memberships is inconsistent with the concept of public interest * * *. The Commission recognizes that good program balance may not permit the sale or donation of time to all who may seek it for such purposes and that difficult problems calling for careful judgment on the part of station management may be involved in deciding among applicants for time when all cannot be accommodated. However, competent management should be able to meet such problems in the public interest and with fairness to all concerned. The fact that it placed an arduous task on management should not be made a reason for evading the issue by a strict rule against the sale of time for any programs of the type mentioned."

United Broadcasting Co., 10 F.C.C. 515, 517-518 (1945). We agree with those views, and see no reason why the Commission and broadcast licensees should be any less competent in 1971 than they were in 1945. Given a scheme of reasonable regulation, there is no reason why acceptance of editorial advertising should cause any substantial harm or disruption not already involved in the acceptance of other advertising. Therefore, to single out and exclude editorial advertising is to violate the First Amendment of the Constitution.

VII

On the basis of the foregoing, we reverse the Commission's decision that a flat ban on all editorial advertising is permissible. However, we remand these cases to the Commission for further consideration. On remand, the Commission should develop reasonable regulatory guidelines to deal with editorial advertisements. Petitioners

should be allowed to reapply for advertising time; and, unless their presentations are found to be excludable under the Commission's guidelines, their applications should be accepted. Since the issues on which BEM and DNC seek to speak are current and changing, it is essential that regulations be developed speedily and that the affected broadcasters pass promptly upon petitioners' applications to buy time.

In the end, it may unsettle some of us to see an anti-war message or a political party message in the accustomed place of a soap or beer commercial. But we must not equate what is habitual with what is right—or what is constitutional. A society already so saturated with commercialism can well afford another outlet for speech on public issues. All that we may lose is some of our apathy. That is a small price to pay. For, as the Supreme Court has said, "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949).

Reversed and remanded.

MCGOWAN, *Circuit Judge, dissenting*: The majority do not hold that petitioner in No. 24,492 is entitled to have its proposed spot announcements carried by the intervenor-licensee there involved, or that the petitioner in No. 24,537 is assured of being able to buy time for its programs on public issues. What is held is that the Constitution commands that "*some*", but not all, editorial advertising be accepted; and the Commission is directed to embark upon rulemaking to determine how a licensee is to differentiate the "*some*" from the all.

The majority appear to believe that this assignment will not prove difficult. I am not so sure, particularly when I note that the only Commissioner who has perceived the same constitutional requirement as the majority responds to the practical problems by suggesting that sales of a significant proportion of the total broadcast time be made on a first-come, first-served basis, accompanied by a possible suspension of the fairness doctrine. That approach does not seem to me a promising one in terms of the public's right to know.

The difficulties derive, of course, from the physical peculiarity which distinguishes radio and television communication from all other forms, namely, the limited number of frequencies and the impossibility of accommodating all who may wish to be heard over them. This, so the Supreme Court has said in *Red Lion*, makes it "idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of each individual to speak, write or publish." The majority, in recognition of this fact, do not purport to discern other than an "abridgeable" or "limited" First Amendment right to initiate paid editorial advertising. Petitioners themselves, it is said, may conceivably never be able to insist that their particular advertising be accepted. That will depend upon the rules which the Commission propounds.

The Commission has, at the least, been set a task of heroic proportions, and one whose very complexities may undermine the premise upon which it is founded. The question is whether the Constitution requires that it be undertaken. I am not convinced that it does. It is presently the obligation of a licensee to advance the public's right to know by devoting a substantial amount of time to the presentation of controversial views on issues of public importance, striking a balance which is always subject to redress by reference to the fairness doctrine. Failure to do so puts continuation of the license at risk—a sanction

of tremendous potency, and one which the Commission is under increasing pressure to employ.

This is the system which Congress has, wisely or not, provided as the alternative to public ownership and operation of radio and television communications facilities. This approach has never been thought to be other than within the permissible limits of constitutional choice. Its existence provides a mechanism for implementation of the public's right to know which, by and large, has been effective. Indeed, the loudest voices in criticism of it complain that it has been working too well for the comfort of governmental policy makers in the areas of greatest current concern.

It is hardly the path of wisdom to scrap it for a system in which money alone determines what issues are to be aired, and in what format, even assuming, as is likely to be the case, that those issues, whatever they may prove to be, compare favorably with the intellectual content of the great bulk of commercial advertising. The responsibility for informing the public is now squarely on the licensee. That responsibility will only be diluted and obscured by requiring the licensee, against his own better judgment, to accept paid editorial advertising. I do not think the First Amendment requires that result, at least not within the context of a regulatory scheme which has made provision for the airing of controversial issues of public importance.

Of course it is true that licensees are currently free to accept paid editorial advertising, and some do, subject always to the limitations of the fairness doctrine. It may well be that a detailed inquiry and investigation by the Commission of this area, by formal rulemaking or otherwise, would be both useful and consonant with the Commission's continuing obligation to see to it that the public interest obligations of the licensees are being met in the most effective way. The Commission's currently announced purpose to undertake a comprehensive and wide-

ranging review of the operation of the fairness doctrine might well include the subject of paid editorial advertising. But, believing as I do that the First Amendment exerts no compulsion to the contrary, I would not order the Commission to undertake that review in a constitutional strait jacket which dictates the result in advance.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1970

No. 24,492

BUSINESS EXECUTIVES' MOVE FOR
VIETNAM PEACE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
INTERVENOR

No. 24,537

DEMOCRATIC NATIONAL COMMITTEE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING CO., INC., INTERVENOR,
COLUMBIA BROADCASTING SYSTEM, INC., INTERVENOR

Petitions for Review of Orders of the Federal
Communications Commission

Before: Wright, McGowan and Robinson, Circuit Judges.

B 2

JUDGMENT

These cases came on to be heard on the records from the Federal Communications Commission, and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the orders of the Federal Communications Commission on review herein are hereby reversed and the cases are remanded to the Federal Communications Commission for further proceedings in accordance with the opinion of the Court filed this date.

Per Curiam

For the Court:
Nathan J. Paulson
Clerk

Dated: August 3, 1971

Opinion by Circuit Judge Wright
Separate dissenting opinion by Circuit Judge McGowan

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1971

No. 24,492

BUSINESS EXECUTIVES' MOVE FOR
VIETNAM PEACE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
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POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
INTERVENOR

No. 24,537

DEMOCRATIC NATIONAL COMMITTEE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING CO., INC., INTERVENOR,
COLUMBIA BROADCASTING SYSTEM, INC., INTERVENOR

Before: Wright, McGowan and Robinson, Circuit Judges.

ORDER

On consideration of the petitions for rehearing filed by Post-Newsweek Stations, Capital Area, Inc., American

Broadcasting Companies, Inc., the United States of America and Federal Communications Commission, and Columbia Broadcasting System, Inc. for rehearing, and of the brief of *amicus curiae* National Broadcasting Company, Inc. in support of the petitions for rehearing, it is

ORDERED by the Court that the aforesaid petitions for rehearing are denied.

Per Curiam

October 4, 1971

APPENDIX D

F.C.C. 70-861

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

IN RE DEMOCRATIC NATIONAL COMMITTEE,
WASHINGTON, D. C.

Request for Declaratory Ruling Concerning
Access to Time on Broadcast Stations

MEMORANDUM OPINION AND ORDER

(Adopted August 5, 1970; Released August 12, 1970)

BY THE COMMISSION: COMMISSIONER COX CONCURRING AND ISSUING A STATEMENT; COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT.

BACKGROUND—REQUEST AND PLEADINGS

1. On May 19, 1970, the Democratic National Committee (DNC) filed with the Commission a request that the Commission issue a declaratory ruling that

"A broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues." [1]

2. DNC seeks a declaratory ruling on these matters because of its desire to purchase time on individual broadcast stations and networks for the purpose of presenting programs and spot announcements of varying duration, some of which would be devoted to the solicitation of funds while others may contain comment on va-

[1] Comments with respect thereto were filed by the American Broadcasting Company (ABC) on June 11, 1970 and by the Columbia Broadcasting System (CBS) on June 22, 1970 and a statement by the National Broadcasting Company (NBC) was filed on June 22, 1970.

rious controversial issues of public importance. The campaign envisioned will, according to DNC, require the expenditure of "thousands of dollars" and thus it seeks assurance that it will be able "to obtain the access to the broadcast media which implementation of the plan demands." It appears that in the latter part of March, 1970, CBS rejected a request by DNC to purchase one-half hour of prime time for the presentation of an issue—oriented program which would have included an appeal for contributions to the Democratic Party. It is said that CBS' position at that time was that it would sell time for political purposes only during election campaigns. DNC also approached NBC and was told that that network would make available prime time for purchase by the Committee for a program presenting the views of the party on important public issues and including a solicitation of funds for the party. It is not clear that DNC approached the ABC network in view of the latter's alleged general policy against solicitation of funds other than for charity and with network approval. By reason of the foregoing and the alleged common policy of individual broadcast stations to decline to sell time for spot announcements or programs for the broadcast of views on controversial issues of public importance or for the solicitation of funds, DNC states that its problem—access to broadcast licensees for the presentation of its programs—can be resolved only through the issuance of the blanket declaratory ruling described in paragraph 1, *supra*.

3. We believe that the policy matters raised by DNC are, to a substantial extent, appropriate for consideration and that a full statement of our views will provide helpful general guidance for the public and Commission licensees. We, however, do not believe that all of the various matters raised by DNC are susceptible to the declaratory order sought and we cannot at this juncture rule upon every conceivable factual situation which may arise.

4. In support of its request, DNC has set forth some pertinent financial considerations of present-day political campaigning and the development of a narrow rather than a broad-based financial support of political parties.[2] DNC contends that access to mass media, particularly radio and television, is necessary to attract the attention and seek the support of potential small political contributors. It is only in this way, DNC contends, that a healthy political system can function. DNC urges that its proposed broadcast campaign should not be precluded by a variety of differing station and network policies and that the question of access to broadcast media for responsible groups should be subject to a uniform national policy. The arguments advanced by DNC are based upon constitutional, statutory and public policy grounds.

5. The constitutional argument advanced by DNC is essentially that the Supreme Court's decision in *Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, 395 U.S. 367 (1969) reaffirmed the public's First Amendment right to hear contrasting views on issues of public importance and "employed language that would extend to members of the public the right of access to broadcast facilities." DNC argues that the network policies of ABC and CBS represent arbitrary barriers to broadcast facilities contrary to the law as expressed in *Red Lion, supra.* DNC suggests that under the *Red Lion* standard reasonable restrictions by broadcasters are permissible—e.g., limitation of use of broadcast facilities to responsible spokesmen and protec-

[2] For example, in 1968, $90 million was expended on political use of radio and television (equaling about 1/3 of the total expenditure on political campaigning for the year). See Alexander and Myers, *A Financial Landslide for the GOP*, Fortune. March 1970, pp. 104, 189. Another indicative statistic is the fact that in 1956, only 40% of the contributions to the Democratic Party exceeded $500 whereas the figure had increased to almost 80% in 1968. According to DNC the narrowing of the political contribution base can result in a dangerous concentration of the sources of revenue in special interest groups which, in turn, threatens the entire democratic process.

tion against use of facilities for libelous presentations or those in bad "taste."

6. According to petitioner, the overriding public policy consideration requiring the declaratory ruling is that the public airwaves—the most powerful communications medium in our society—which are used to solicit funds for "soaps, brassieres, deodorants and mouthwashes" should be utilized to solicit funds to enhance the exchange of ideas. DNC contends that regardless of whether the Commission issues the declaratory ruling requested, the refusal of a broadcaster to sell time to DNC should be evaluated adversely to such broadcaster at time of renewal. The reason for this, DNC urges, is the importance of the broadcast media to political expression (*Farmers Ed. and Coop Union* v. *WDAY*, 360 U.S. 525, 529-30 (1959)); the public interest consideration inherent in broadcasters making time available for political broadcasts (*Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 20 RR 1901 (1960)); the Commission's prior holding that an arbitrary limitation of coverage of an election campaign prior to the campaign was contrary to the public interest (Citing *Homer R. Rainey*, 3 RR 737 (1947); *City of Jacksonville*, 12 RR 113, 180j (1959); and *Loyola University*, 12 RR 1017, 1099 (1956)) and that the Commission's ruling in *Women's Strike for Peace* (letter of November 22, 1965) predates *Red Lion* and, to the extent it conflicts with that decision, is no longer controlling. Finally, DNC notes that it is seeking not a ruling which would require a broadcaster to accept particular programs or announcements, but only that broadcasters may not establish arbitrary barriers to access by responsible groups, such as DNC, contrary to the First Amendment and *Red Lion*, *supra*, or that the establishment of such barriers is contrary to the public interest.

7. *Response of the Networks:* In response to the DNC request, American Broadcasting Companies, Inc. (ABC)

submitted portions of its "standards and policies" (The complete version has been filed in BAL-5733, Exhibit I-B, Attachment B, Section III). ABC recites its standards relating to solicitation connected with appeals for charity (no solicitation without specific permission of ABC) and appeals related to religious broadcasts (solicitation permitted in prescribed manner not here relevant), but states that its policy is not to sell time for solicitation of funds in other situations, absent special public interest considerations. It is ABC's judgment that DNC's request is concerned with "the continued strength and viability of our two party system" and is thus a "special public interest consideration" justifying an exception to its normal policy of not selling time for solicitation purposes.

8. ABC states that with respect to controversial issues of public importance, there are "dozens" of "responsible entities" who would wish to purchase time to present their views "were we to open the door." ABC contends that it would be "reasonable to anticipate a flood of such requests." Thus, ABC states, it will adhere to its general policy against the sale of time for controversial issue programs and announcements. However, ABC under its "special public interest consideration" standard would ". . . be prepared, consistent with its other obligations, to accept such orders for time from major political parties as can be accommodated on a reasonable basis."

a. CBS' lengthy response to the DNC complaint advances three major arguments: (1) that DNC has misunderstood CBS' policies relating to presentation of controversial issues and that CBS' policies insure full and fair presentation of such issues; (2) that a regulatory policy which imposes common carrier obligations on broadcasters would be contrary to the public interest; (3) that there is no constitutional or statutory right to compel broadcasters to carry the DNC programs; and, (4) that such obligation would be contrary to the Communications Act and Commission precedent.

9. With respect to the first major argument, CBS argues that DNC has not alleged violation of the fairness doctrine but rather seeks to take presentations of controverial issues away from the control and supervision of the licensee. CBS states that if licensees were required to permit the purchase of air time for the presentation of views on controversial public issues, the nature of broadcasting would be radically altered to the detriment of fair, objective and balanced information available to the listening public.[3] CBS has followed a policy of refusing the sale of broadcast time for presentations of controversial issues in favor of providing "significant opportunities" for such discussions without charge to proponents of various viewpoints through news and information broadcasts. To sell time for presentations on public issues, argues CBS, would result in the preemption of the limited broadcast frequencies by those with strong financial resources which would "necessarily distort the manner in which issues were presented" to the public. CBS asserts that under its present policies, it provides a "high proportion of direct presentations of views" by "the actors in the events of the day" and thus, aside from fully informing the public of differing viewpoints on controversial issues, also provides an opportunity for those holding differing viewpoints to present their own views. These direct presentations, CBS notes, are part of its overall effort to inform the public fully and fairly and

[3] CBS asserts that it has served the public by presenting issues and viewpoints within a balanced program schedule utilizing newsworthiness as the sole criterion. CBS emphasizes the growth of public affairs and news presentations during the 1968-69 v. 1956-57—e.g., total hours of news and public affairs broadcasting—1,354 v. 675; prime presentations—192 v. 34; regularly scheduled hard news 6:00 p.m.—11:00 p.m., 338 v. 130; and total hours of news documentaries 100 v. 37. In addition, CBS also presents a comprehensive exhibit to demonstrate the coverage given one of the major issues of the day by CBS and WCBS-TV—the Indochina War and domestic reaction to it. This Indochina exhibit includes a minute and second analysis of CBS' total coverage of this issue and runs over 100 pages.

are not permitted to become an instrument of "partisan advocacy." The First Amendment, CBS argues, is primarily concerned with the right of the public to be informed—as opposd to the right of the public to speak or to be heard.

10. CBS' policy against sale of time for the presentation of views on controversial issues does not apply to broadcasts on behalf of political candidates or ballot propositions. This exclusion is based upon CBS' belief that the intent of Section 315 is to facilitate the discussion of political issues by legally qualified candidates; such political broadcasts may include a direct appeal for funds so long as CBS is not involved in the collection or handling of such funds. CBS also states its intention to permit the purchase of a special category of spot announcement (up to one minute in length) for the purpose of political fund raising which need not be on behalf of political candidates or ballot propositions.

11. With respect to the common carrier argument, CBS states that such a policy would be contrary to the public interest because partisan presentations would diminish the time available for other news, sports and entertainment programs and would result in an "auction" to the highest bidder to determine what issues will be discussed and how such discussion will be conducted. Moreover, CBS queries, would the broadcaster then be responsible for restoring the balance? How would a network choose among competing bidders if not enough time were available for all? What standard is to be used to determine "responsible entities?" CBS argues that DNC's proposal would divest the licensee of responsibility for controversial issue programming and would ultimately require the Commission to make judgments as to the specific programs which are presented or rejected.

12. The legal arguments which CBS advances—i.e., that DNC's request is without constitutional or statutory

basis, that Commission compulsion to carry DNC's programs is barred by the Communications Act, and that the action which DNC requests of the Commission is contrary to the Commission's own policy and precedent—are based primarily upon the assertion that no particular person or group has the right to speak over broadcast facilities and that to assert such a right would ultimately require the Commission to assume the role of a censor or arbitor of specific programs, contrary to its long-established policy of avoiding such governmental involvement. CBS asserts that the *McIntire* case [4] stands for the proposition that "broadcasters, though licensed by the Commission and subject to its valid regulations, are not publicly owned facilities, and there is no First Amendment right to purchase time on radio or television stations." CBS further asserts that nothing in *Red Lion* [5] indicates that *McIntire* is no longer good law or that, apart from Section 315, there is any legal obligation for broadcast licensees to sell time. Rather, CBS says, *Red Lion* merely sustained long-standing Commission policies which are wholly inconsistent with DNC's request.

13. To accede to DNC's request, CBS argues, would violate Sections 3(h) and 326 of the Communications Act, which taken together establish that the licensee—not the Commission—is to exercise the power of program selection. The right of *personal* reply to material previously selected for broadcast is limited to equal opportunity for political candidates, replies to personal attacks and replies to station political endorsements. CBS contends that the legislative history of the Communications Act supports its assertion that the statutory scheme envisions a system in which the broadcaster is left with the initiative of assuring that programs presented are in the public interest.

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[4] *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F.2d 597 (3rd Cir. 1945) *cert. den.* 327 U.S. 779 (1946).

[5] *Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, 395 U.S. 367 (1969).

14. Finally, CBS asserts, DNC's request is "fundamentally inconsistent" with the concept of licensee responsibilities and specifically, contrary to the Commission's prior holdings that "the Commission has no power to require a broadcaster to carry or refrain from carrying any particular program, or to prescribe the content of any program presented over the air." Letter to *Women's Strike for Peace*, November 22, 1965.[6] Nothing in the *Red Lion* decision, *supra*, states CBS, indicates that the Court contemplated the abandonment of "traditional FCC fairness policies" and the adoption by the FCC of a common carrier theory as set forth in the DNC request.

15. NBC has no policy which would prevent the purchase of program time envisioned by DNC or the solicitation of funds for the party during such a program. DNC states that it is not clear whether NBC would permit short spot announcements designed for the solicitation of funds for a party, but this simply points up the desirability of a concrete factual situation—namely, of DNC making a specific request, instead of the general, more vague approach which it has taken here.

DISCUSSION

Part I. The right of responsible entities to purchase time for comment on public issues

16. The DNC petition raises two separate questions: (i) the asserted right of political parties to purchase broadcast time to solicit funds, and (ii) the asserted right of responsible entities to purchase time for comment on public issues. In this Part I, we deal with the second question.

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[6] To support this proposition, CBS also cites *McIntire* v. *Wm. Penn Broadcasting Co., supra;* 1949 *Editorilizing Report,* 13 FCC 1246; 1960 *Report and Statement of Policy in the En Banc Programming Inquiry,* 25 Fed. Reg. 7291 (August 3, 1960); and letter to *Judy Collins,* March 24, 1970.

17. That question goes to the heart of the system of broadcasting which has developed in this country—i.e., the licensing of private entities under the public interest standard. While the issues raised by the DNC petition are fundamental, they are not open. They have long been settled adversely to the DNC position, by the statute, by the Commission, and by the Courts. We shall discuss the present system and its statutory support, the relevant precedents, and the policy considerations.

18. The system which Congress has evolved has been described in full in the landmark decisions in this field—*NBC* v. *U.S.*, 319 U.S. 190 (1943), and *Red Lion Broadcasting Co. Inc.* v. *F.C.C.*, 395 U.S. 367 (1969). We shall not repeat that discussion here. It is sufficient to note that it is based upon the unique nature of radio—that "unlike other modes of expression, radio inherently is not available to all. Because it cannot be used by all, some who wish to use it must be denied." (*NBC* v. *U.S.*, *supra*, at 226.)[7] To resolve the chaotic situation which had resulted, Congress decreed a system of licensing private entities for short terms, upon the condition that their operations serve the public interest. It is thus incumbent upon these public trustees to fashion schedules which do meet the needs and interests of the public. To do so, the broadcaster must allocate programming among the several categories (e.g., entertainment, instruction, news, public affairs) and, within those categories, must choose among the many competing requests for air time. See *Report on Editorializing*, 13 FCC 1246, 1247-48 (1949). However, there is one special obligation which the Commission has stressed—that broadcasters must ". . . devote a reasonable percentage of their broadcast time to

[7] The Court recently reaffirmed this vital distinction in *Red Lion* (*supra*, at 388): "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish."

the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station" (*id.* at p. 1249). Indeed, the Commission has stressed that it has allocated so much spectrum space to broadcasting, basically because of the great contribution which broadcasting can make to an informed public opinion on the vital public issues of the day. *Ibid., Storer Broadcasting Co.*, 11 FCC 2d 678. It follows that the Commission can and must require the achievement of that allocation purpose by its broadcast licensees. See Section 303(b); *Red Lion Broadcasting Co. Inc.* v. *F.C.C., supra* at p. 394. In short, as stated by the Court in *Red Lion, supra,* at p. 394, the licensee is ". . . given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern."

19. The Commission has consistently made clear that with some exceptions not here pertinent, the licensee has discretion in discharging that obligation. Thus, in its basic *Editorializing Report,* the Commission stated:

> It should be recognized that there can be no one all-embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other

> available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request . . . .

This same policy is set out in the Commission's 1964 *Fairness Primer*, 29 Fed. Reg. 10415, 10416; cf. also 1960 *Programming Statement*, 25 Fed. Reg. 7291 (1960). In line with these general precepts, we have consistently held, in case after case, that with certain exceptions not here involved, no individual has a right to express his particular views by means of a broadcast facility.[8]

20. While the licensee thus has considerable discretion in discharging "the twofold duty" stated in *Red Lion, supra*, at 377—to devote a reasonable amount of time to public issues and to do so fairly—that discretion must be exercised consistent with the public interest standard. The most basic consideration in this respect is that the licensee cannot rule off the air coverage of important issues or views because of his private ends or beliefs. As a public trustee, he must present representative community views and voices on controversial issues which are of importance to his listeners (*Red Lion, supra*, at 389, 390, 394). This means also that some of the voices must be partisan. A licensee policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner would run counter to the "profound national commitment that debate on public issues should be uninhibited, robust, and wide-open." *New York Lines Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); see also *Red Lion Broadcasting Co. Inc.* v. *F.C.C.*, 395 U.S. 367, 392 (n. 18) (1969); *Storer Broadcasting Co.*, 11 FCC 2d 678 (1968); *Anti-Defamation League of B'nai B'rith*, 9 FCC 2d 190, 191 (1966), affirmed *Anti-Defamation League* v.

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[8] *Dowie A. Crittenden*, 18 FCC 2d 499 (1969); *Mrs. Margaret Z. Scherbina*, 21 FCC 2d 141 (1969); *Democratic State Central Committee of California*, 19 FCC 2d 833 (1968); *Boalt Hall Student Association*, 20 FCC 2d 612 (1969); *Mrs. Madalyn Murray*, 40 FCC 647 (1965).

F. C. C., 403 F. 2d 169, 170 (1968) (C.A.D.C.), *cert. den.* 394 U.S 930 (1969). In sum, as stressed in the *Editorializing Report*, *supra*, at p. 1249:

> It is this right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

See *Red Lion Broadcasting Co. Inc.* v. *F.C.C.*, *supra*, at p. 390:

> It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here.

21. With this as background, we turn to the DNC petition. That petition seeks to overrule the above policy and to require licensees to sell time to any responsible entity to comment on a public issue. Using the CBS response as an example, we note that it would require a holding that CBS' policy in this area is inconsistent with the public interest, because although it recognizes its obligation to devote a reasonable amount of time to controversial issues of public importance (and has submitted a showing of its increasing efforts in this respect, including during prime time hours), and to do so fairly by providing ". . . significant opportunities for such [broadcast] discussion without charge to partisans of various viewpoints in [its] news and information broadcasts" (p. 3, CBS Response), CBS will not sell time for the expression of viewpoints on public issues (with the exception of political broadcasts). It is important to bear in mind that DNC has not alleged that CBS or any other licensee has failed to discharge the above-noted obligations of the fairness doctrine. Thus, what is involved in the DNC request is a question whether there is a right of access to broadcast facilities by "responsible entities" over and

beyond the fairness doctrine right of the public to be informed.

22. The DNC position—that the licensee, upon request, must sell time to any responsible entity for comment on public issues—runs counter to the statutory language and the legislative history. That history shows that Congress specifically debated and rejected the idea of the licensee being required to act as a common carrier with respect to transmission of comment on public issues. See Sen. Rep. No. 772, 69th Cong., 1st Sess., p. 4; 67 Cong. Rec. 5560-5561, 12501-12504. The Act reflects this. Section 3(h) states that a broadcaster shall not be deemed a common carrier. Section 315(a) sets out the pertinent statutory standard—that the licensee must operate in the public interest and must afford reasonable opportunity for the discussion of conflicting viewpoints on controversial issues of public importance. This language cannot be squared with the DNC position; had Congress adopted such a position, the statutory prescription would have been entirely different (e.g., . . . "including the sale upon request of time to responsible entities for presentation of a viewpoint on controversial issues of public importance"). The legislative history makes clear that the language of Section 315(a) is a "restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934" (H. Rep. No. 1069, 86th Cong., 1st Sess., p. 5 (1958)—that is, as the legislative history shows, the principles set forth in the basic *Editorializing Report.* That this is the statutory scheme is further shown by the consideration of the second sentence of Section 315(a)—that "no obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate." The purpose of this provision is to make clear that the broadcaster is not a common carrier as to political broadcasts—that he may exercise discretion as to the time to be afforded broadcasts by candidates. See *Memorandum of F.C.C.*, Hear-

ings before the House Subcommittee of the Interstate and Foreign Commerce Committee, 88th Cong., 1st Sess. on H. J. Res. 247, pp. 84-90 (1963) (to the effect that while the licensee has discretion, he cannot adopt a policy of not devoting a reasonable amount of time to political broadcasts). It would make no sense to hold that the licensee has discretion whether or not to sell time for the most important controversial issue programming of all—the political broadcast by the candidate (see discussion within as to the preferred position of such programming), but has no such discretion as to other controversial issue programs (e.g., by a candidate's supporters; by partisans of a particular viewpoint on some public issue).

23. The administrative and judicial precedents reflect the statutory scheme. The Commission's pronouncements are long established and consistent. See, e.g., *Report on Editorializing*, 13 F.C.C. 1246, 1249 (1949); 1960 *Programming Statement; Women's Strike for Peace*, November 22, 1965. The court cases are to the same effect. *McIntire* v. *William Penn Broadcasting Co.*, 151 F. 2d 597, 600-601 (C.A. 3), *cert. den.* 327 U.S. 779; *Massachusetts Universalist Convention* v. *Hildreth and Rogis Co.*, 183 F. 2d 497, 501 (C.A. 1). DNC argues that these cases are no longer relevant in light of the Court's decision in *Red Lion*, and that that decision establishes the correctness of its position. We do not so read *Red Lion*. The Government's brief pointed up the nature of the licensee's responsibility under the *Editorializing Report*, *supra*, at pp. 14-17, 31-32, and the Court recognized the report "as the principal summary of [the Commission's] *ratio decidendi* in cases in this area" (p. 1251). The Court at the outset noted "the twofold duty" imposed by the *Editorializing Report* and the manner in which the obligations under the general fairness request differed from those under the personal attack corollary (pp. 371-379).[9] The

[9] Thus, the Court stated: "These personal attack and political editorializing obligations differ from the general fairness require-

Court's decision is based, we believe, on this foundation. The thrust of that decision is not that the broadcast licensee is a common carrier, required to sell time to all comers on public issues, but rather that he is a public trustee—a proxy—who must present *representative* community views and voices on controversial issues. The Court's decision thus stresses the right of the public to be informed—not the right of the broadcaster or any individual or group to speak over broadcast facilities. The private censorship by broadcasters which the Court rules out is that which would prevent the presentation of representative community views or voices.

24. There are strong policy arguments in support of the Congresssional scheme. We have noted that broadcasting is inherently not open to all (paragraph 18, *supra*). That is true equally with respect to the common carrier access approach urged by DNC. The result could well be a return to the chaotic situation of radio's early days. Since the broadcast medium is a limited one, the amount of time to be devoted to public affairs—as against the other needs and interests of listeners—is also limited. This balance between the categories could be drastically skewed by a requirement that the broadcaster must make available time slots for the discussion of a controversial issue. Further, the public's agenda for discussion of public issues would then be set substantively and increasingly by the affluent—by the person or group which ". . . has the financial resources and interest to purchase sustained access to the mass communications media . . ." (*Banzhaf* v. *F.C.C.*, 405 F. 2d 1082 (C.A.D.C. 1968),

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ment that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attached party's side himself or choosing a third party to represent that side. But insofar as there is an obligation of the broadcaster to see that both sides are presented, and insofar as that is an affirmative obligation, the personal attack doctrine and regulations do not differ from preceding fairness doctrine." *Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, 395 U.S. at 378.

cert. den., 396 U.S. 842). Since the amount of broadcast time for discussion of controversial issues is limited and since the licensee must afford reasonable opportunity for discussion of both sides, the purchase of substantial blocks of time for a campaign by, say, the oil industry to discuss the issue of the oil depletion allowance would impose the burden to present reasonably the other viewpoint, and in turn would inevitably cut down on the amount of time for discussion of other issues. But we believe that such allocations of limited time are to be made on the basis of the *public* interest—not that of any private group, however powerful or affluent. Further, the public trustee would lose control over the important aspect of the manner in which the public is to be informed. We recognize that in some instances short spot announcements may serve a useful purpose in this area (see *infra*, p. 17). But we have also pointed up the limitations as to many issues of this manner of informing the public. See e.g., Hearings before the Senate Commerce Committee, H.R. 6543 (1969), pp. 142-143; *Voters Time Rept.*, p. 15. A licensee which reasonably made the judgment that an issue was too complex to be discussed in a 30-second commercial —that "hawking" the issue like a soap did not serve the public interest—would find that judgment frustrated by the DNC policy; it would be required to sell the spots and ordered to make time available to opponents on a similar basis. See *Cullman Broadcasting Co.*, 40 FCC 516 (1963); *KING Broadcasting Co.*, 10 FCC 2d 968, 970 (1967).

25. This last point—the application of *Cullman*—merits further discussion. The *Cullman* principle was developed to deal with the situation where the broadcaster has sold time to one side to present its views, has not presented or made plans to present the contrasting viewpoints, and rejects programming which he deems suitable to present those viewpoints, unless the party offering such programming will pay for its presentation. We held that the licensee could not properly insist upon payment in

such circumstances. The paramount public interest, we stressed, is the right of the public to be informed. The licensee has adjudged that an issue is of importance to its area by presenting the first viewpoint; that being so, the public's right to hear the other side cannot turn on whether the licensee received money.[10] This approach perfectly fits the public trustee concept. It does not fit a common carrier approach. For under the latter system, the licensee has to sell the time, no matter the amount, and then finds himself having to afford free time to the proponents of the contrasting viewpoint, again no matter what the effect on his ability to serve the public interest. Further, under a common carrier approach, each side is usually relegated to purchase, with no "*Cullman*" rights. We believe that *Cullman* is a correct and sound doctrine which ties in with the public trustee concept and best serves "the public interest in the larger and more effective use of radio" (Section 303(g)).

26. In connection with the above discussion, we should note that there is of course no Commission policy thwarting sale of time to comment on public issues. Licensees are free to do so, with the caveat that the fairness doctrine, including the *Cullman* aspect, must be observed. The critical issue is whether the licensee, to discharge either of "the twofold duties" noted at the outset—to devote a reasonable amount of time to issues of public importance and to do so fairly—must sell some time to comment on public issues. The foregoing discussion makes clear that the licensee need not do so. If, for example, CBS chooses not to sell time but rather to fulfill its obligation on a sustaining basis in the manner disclosed in paragraph 9, *supra* (e.g., to provide significant free opportunity for partisan presentations), that choice is within its discretion. What is crucial is that the licensee does meet its obligation "to operate in the public interest

[10] For the different application of *Cullman* to the political broadcast field, see *Letter to Nicholas Zapple*, FCC 70-598 (1970).

and afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (Section 315(a).)

27. Finally, we point out that the Commission does recognize the importance of fostering "a multitude of voices" in the discussion of public issues. Thus, it sought to promote the growth of FM radio, UHF television, and noncommercial educational broadcasting, and is seeking to promote a new technology which can make a most significant contribution in this respect—cable television. Because of the potentially great number of channels, cable opens up the possibility of common carrier channels, public access channels, etc. See Notices of Proposed Rule Making In Dockets Nos. 18397A and 18874, 23 F.C.C. 2d ——, released July 1, 1970. But the policy in the broadcast field is shaped by the inherent characteristics of that field. As we have shown, that policy is based on the right of the electorate to be informed, and is an issue-oriented "right of access," not the right of any individual to access.

28. At the risk of some repetition (see particularly pars. 24, 25), we believe it appropriate to take up the position set forth in the dissent of Commissioner Johnson.[11] We cannot accept the position of the dissent that the course we are taking conflicts with the First Amendment. As we understand it, the dissenting opinion of Commissioner Johnson urges that the operation of a broadcast station is analogous to the administration of a public facility, such as a park or a municipal bus (whether publicly or privately owned), and that once the facility is appropriately opened for the expression of views on public issues or commercial advertisements, it is a denial of First Amendment rights to reject or censor a profferred

[11] That dissent is addressed also to the Commission's decision in the *BEM* case, F.C.C. 70 ——, issued this day. Our discussion here is of course equally applicable to the *BEM* case, and we so stated in that opinion.

announcement constituting constitutionally protected speech by one willing to pay the customary rate, if there is ordinarily a charge. While we need not disagree with the premise that the Commission's regulation of broadcast stations under the Communications Act must meet First Amendment standards, we think that the dissent—because it ignores established First Amendment policy in this area—posits a non-existent individual right of access to broadcast facilities.

29. First of all, to the extent that the dissenting opinion urges a near-absolute right of any person who has the money to buy time, it would create a common carrier situation which Congress after due deliberation specifically rejected in Section 3(h) of the Communications Act, 47 U.S.C. § 153(h). Apparently recognizing this collision with the statute, the dissent states (page 25) that Congress and the Commission have permitted a form of private censorship which is inconsistent with the First Amendment. We must note in this connection that it is beyond the power of an administrative agency to declare its governing statute to be unconstitutional. *Central Nebraska Pub. P. & I. Dist.* v. *Federal Power Commission*, 160 F. 2d 782, 783 (C.A. 8, 1947). However, if that infirmity did not exist, we would have no constitutional qualms about our present decision.

30. In its assertion of the unconditional (except for suggested reasonable limitations on time, place and manner) [12] right to buy time, the dissenting opinion takes no account of the basic, constitutionally valid policy of the Communications Act that because radio is "inherently not available to all," *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226, there is a public duty adhering to the acceptance of a license to give adequate coverage to public issues which reflects opposing view-

[12] The dissent also mentions quality standards, an exception which is hardly consistent with its argument.

points, if necessary at the broadcaster's own expense. *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367. See also 47 U.S.C. § 315(a). As *Red Lion* makes clear, the licensee is a fiduciary with obligations to present views and voices which are representative of his community. It is through this basic approach that the paramount right and interest of the public to be fully informed is protected. The operator of a public park or transit system has no such obligation; if the analogy offered by the dissent were valid, a broadcaster would be free to present only one side of every public issue so long as he did not reject any one who chose to speak. There would be no obligation to present the other side, let alone the obligation imposed by *Cullman Broadcasting Co.*, 25 R.R. 895 (1963) to put on an opposing view without charge. It is clear, therefore, that the analogy to other types of facilities that carry speech to the public, or furnish a place for speech, is fatally faulty.

31. Furthermore, the dissent fails to be adequately specific in detailing the types of limitation which it would permit as inroads to the general principle of an absolute right of access. Presumably, the licensee would not have to turn over all of its time on a first come, first served basis, for this would mean that the issues discussed and the persons speaking would be governed entirely by money. But even if the dissent would permit the licensee to specify amounts of time and issues, the suggested system would appear to be unsound. First of all, the individual right upon which the whole dissent is premised would largely disappear. No person would have the right to discuss an issue of his choosing, at the time of his choosing, and for a duration of his choosing. How could the licensee validly determine that a particular speaker could effectively make his argument in 10 minutes, 5 minutes or a 30-second spot? Yet such determinations would be required. We have said that a licensee may

reasonably determine that a position on a complex issue should not be peddled like soap in a few seconds. The dissent would presumably upset that ruling—to what purpose? Beyond these questions is the more important difficulty that depriving the licensee of the discretion to choose representative spokesmen on controversial public issues [13] would lead us to a first come, first served platform dominated by financial considerations—the very result the dissent seeks to avoid and something the Supreme Court has already stated to be undesirable in *Red Lion*.

32. In short, we think the present system of regarding licensees as trustees, *McIntire* v. *William Penn Broadcasting Co.*, 151 F. 2d 597 (C.A. 3, 1945), *cert. den.* 327 U.S. 779, with a duty to present contrasting viewpoints through representative spokesmen, is constitutionally sound and of greater public benefit than the concept of an individual right of access, which as we have shown has great drawbacks in the broadcast field.

Part II. The right of political parties to purchase broadcast time to solicit funds [14]

33. In view of the positions now taken by the three major networks (the only parties whose policies were singled out by DNC were CBS and ABC), no extended discussion is called for in this Part.

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[13] There could be a case where the licensee's policy in this area would be arbitrary (e.g., where he covers the issue, and in announcements of a few seconds duration, and then refuses to let others discuss the issue on this basis). No such case is or has been before us. We have ruled on the assertions of DNC and BEM of general entitlement to time to discuss public issues. Our holding is in that context.

[14] While the DNC petition is couched in terms of selling time to "responsible entities" to solicit funds, the petition before us is that of a political party and our discussion here is confined to purchase of time by such parties for solicitation of funds.

34. NBC has stated that it has no policy against the sale of time to a major national political party, to be used for the solicitation of funds for the party, including during non-campaign periods. CBS initially rejected the DNC request since it occurred outside an election campaign, but has now revised its policy to permit the purchase during any period by a political party of spot announcements (not to exceed one minute in length) designed to solicit funds for the party. ABC set forth its policy that "absent special public interest considerations, ABC will not sell time for comment on controversial issues or for solicitation of funds" (p. 3, ABC of June 10, 1970, to William B. Ray), but then stated:

> The continued strength and viability of our two party system are of vital importance. ABC has emphasized in recent Congressional hearings the importance of a wider base for political contributions—small sums from millions of Americans rather than large contributions from a few.
>
> * * * *
>
> Because the strength and viability of the major political parties are vitally important, ABC would be prepared, consistent with its other obligations, to accept such orders for time from major political parties as can be accommodated on a reasonable basis. At the same time, we proposed to continue our general policy against the sale of time for controversial issue programs and announcements and solicitations for funds, absent special public interest considerations.

ABC then invited the Commission to address itself to its proposed treatment of the case.

35. We concur in that treatment. We note that Congress has singled out the presentation of the political broadcast as a particularly important aspect of the licensee's public interest obligation. See Section 315(a), *Farmer's Union* v. *WDAY*, 360 U.S. 525 (1958) (citing

F.C.C. cases); F.C.C. Memorandum on Second Sentence of Section 315(a), Hearing before Subcommittee of Interstate and Foreign Commerce Committee, 88th Cong., 1st Sess., on H.J. Res. 247, pp. 84-90. It also requires no discussion to establish that political parties are an integral part of our democratic process and that it serves the public interest to promote the widest possible support by citizens of the party of their choice. See *Voters Time Rept.*, The Twentieth Century Fund (1969), pp. 45-57.

36. In a 1963 ruling, *Letter to Lawrence M. C. Smith*, 40 F.C.C. 549, we sought to encourage the presentation of free broadcast time for this purpose stating:

> First, we recognize that the announcements described by you constitute an effort to achieve the worthwhile and commendable goal of broadening the base of political contributions. The importance of this effort was recently emphasized when, on May 29, 1962, President Kennedy transmitted to the President of the Senate and the Speaker of the House of Representatives legislation designed to carry out five of the important recommendations contained in the "Report on the President's Commission on Campaign Costs." In his letter of transmittal, the President stated, among other things:
>
> "In these days when the public interest demands basic decision so essential to our security and survival, public policy should enable presidential candidates to free themselves of dependence on large contributions of those with special interest. Accordingly, it is essential to broaden the base of financial support for candidates and parties. To accomplish this, improvement of public understanding of campaign finance, coupled with a system of incentives for solicitation and giving, is necessary."
>
> Furthermore, your proposal has an objective, in common with the broad policy underlying the "fairness doctrine"—the right of the public in a free so-

ciety to be fully informed as to controversial issues of public importance, including those involving political parties and candidates. See paragraph 6 of enclosed *Editorializing Report.*

Second, the question whether to present such announcements is one for the licensee, who is faced with many competing requests to allocate time for public service announcements. The Commission of course expresses no opinion as to how that time should be allocated. But the announcements in question should not be rejected upon the sole ground that the licensee would have to be fair in their presentation. *Lawrence M. C. Smith,* 25 Pike and Fischer Radio Reg. 291, at 293 (1963).

37. Whether such time is afforded on a free basis is a matter for the judgment of the licensee. The issue here is whether the licensee may adopt or follow arbitrary policies with respect to the sale of broadcast time to significant political parties for the solicitation of funds. Thus, the prior CBS policy of confining such sales of time to election periods would appear arbitrary, since the need for the widest possible financial support for political parties is not confined to such periods; and indeed we note that CBS offered no reason for such a distinction.

38. In this connection, we note that affording time for such solicitation does not raise any offsetting considerations, because of the combined force of a number of factors:

(i) This area can be appropriately singled out, since Congress has singled it out for special attention by broadcast licensees;

(ii) This would appear particularly to be an area where the relatively short announcement, limited very

largely to fund solicitations, is both effective and appropriate.[15]

(iii) There is no problem under *Cullman.* For, in this regard the principles set forth in *Letter to Nicholas Zapple,* FCC 70-598 (1970), would govern.

CONCLUSION

39. In view of the foregoing, the request of the DNC and ABC for a declaratory ruling IS GRANTED to the extent reflected in Part II and in all other respects, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER KENNETH A. COX

I concur. The essence of the holding as to sale of time for the discussion of controversial issues—as of the *Red Lion* and *Cullman* cases—is that a broadcaster *must* devote substantial time to the presentation of news and public affairs programming dealing with the principal issues of this area. He can sell time for this purpose—subject to *Cullman*—but we will not require him to do so against his wishes. Or he can—and this is generally to be preferred—give time for both sides. I *assume* here that the networks have given, or will give, adequate time for discussion of the key partisan political issues of our time. If not, then we must hold them to that obligation.

I therefore concur generally in this action, except for the matter contained in Paragraph 27.

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[15] Of course, the licensee may exercise judgment as to how to present these solicitations for funds, and can afford more extensive programming time, if he so chooses. Indeed, we stress again the considerable discretion of the licensee, consistent with the obligation of the fairness doctrine, as to the various facets such as number, placement, length, etc. *Cf. Lawrence M. C. Smith,* 40 FCC 549.

Dissenting Opinion of Commissioner Nicholas Johnson

[An opening parable]

[Once upon a time there was a nation as great in ideals as industrialization. It had business everywhere—and unsurpassed military might to protect it. And yet its greatest strength was its foundation. For this nation professed to be governed by the consent of its citizens. To insure the successful functioning of its unusual government, free education, libraries, and full information were provided in order that its 200 million governors, through wide-open debate, might govern wisely. As the years slipped by the people spent more and more time in their air conditioned homes watching television, and less and less time listening to speakers in the public parks and reading handbills on the streets. And yet the great issues, and the need for informed governors, continued. And thus it was that the great debate about the great debate began.

[Everyone had his own theory how to get the democratic dialogue back to the people (who were all home watching their television sets). Some advocated letters, petitions, press conferences, and picketing, but they didn't seem to be successful. Attention shifted to those who advocated bombing, burning, shooting and looting, because before and after the showing of such activities it was usually possible to present a short message on television (however distorted) about the merits of the issue at hand. Then a third group came along. It said, "Let us simply go to the broadcasters peacefully, and ask them for the time to present our concerns—and even pay them." They were jeered by the crowd, but not deterred. The broadcasters politely explained that there was no longer any room at their inn for the discussion of public issues—like war, and life, and politics—because the time all had to be

used for programs and announcements necessary to the very difficult but essential task of manipulating consumers to buy useless and harmful products. And yet these patient and patriotic students, businessmen, and Senators still did not give up. They continued to preach the doctrine of "working within the system." "The government," they said, "will treat us fairly. There is reason and justice in our land. Surely a democratic people need not be violent to be heard." And so it was that they came to the FCC. . . .]

The Democratic National Committee (DNC) has asked the Commission for a declaratory ruling requiring broadcasters to supply two types of "access" to their radio and television facilities: first, the right to purchase, at current commercial rates, short "spot announcements" to solicit funds for political purposes; second, the right to purchase longer segments of airtime for presentation of political programming on important national issues. The majority, so far as I can determine, has equivocated on the first request, and denied the second. I dissent.

I

We should start with a few fundamentals. The great concept of our Constitution, embodied in the First Amendment, was that our democratic government would endure only so long as its citizens and their elected representatives had the leisure to think, the right to speak, and the freedom to criticize their government. As Supreme Court Justices Holmes and Brandeis understood, "the best test of truth is the power of the thought to get itself accepted in the competition of the market," and that in a government of free men, "the deliberative forces should prevail over the arbitrary." See *Abrams* v. *United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting); *Whitney* v. *California*, 274 U.S. 357 (1927) (Brandeis, J., concurring).

The issues we grapple with today, therefore, pose a crucial question. How can we create a free and open "marketplace of ideas" over the radio and television medium in which citizens, and their elected representatives, can discuss the great issues that weigh upon our nation?

The second fundamental is equally important. For speech to be free, there must be both a *forum* for communication—whether it be a public park, school, town hall meeting, soap box, leaflet, newspaper, magazine, or radio or television frequency—as well as *procedural rules* to keep order, to make it possible for all (or most) to speak in turn, and be heard, in that forum. Perhaps the greatest legal distinction to be drawn in political and free speech theory is that between restrictions on the *content* of speech (which the First Amendment flatly prohibits), and regulations for the manner of speech (which the First Amendment not only permits but requires). As this nation's concept of speech derives principally from the model of the town meeting, I quote Professor Alexander Meiklejohn, one of the greatest champions of First Amendment freedoms, as he describes the town meeting:

> In the town meeting the people of a community assemble to discuss and to act upon matters of public interest—roads, schools, poor houses, health, external defense, and the like . . . . The basic principle is that the freedom of speech shall be unabridged. And yet the meeting cannot even be opened unless, by common consent, speech is abridged. A chairman or moderator is, or has been, chosen. He "calls the meeting to order." And the hush which follows that call is a clear indication that restrictions upon speech have been set up. . . . [N]o one shall speak unless "recognized by the chair." Also, debators must confine their remarks to "the question before the house." . . . The town meeting, as it seeks for freedom of public discussion, would be wholly ineffectual unless speech were thus abridged. . . .

Meiklejohn, *The First Amendment Is An Absolute*, 1961 Supreme Court Review 245.

Although the First Amendment would clearly ban governmental censorship of speech content, government must be concerned about the procedural rules that control the public forums for discussion. If someone—a moderator, or radio-television licensee—applies rules that give one speaker, or viewpoint, less time (or none at all) to present a position, then a censorship exists as invidious as outright thought control. There is little doubt in my mind that for any given forum of speech the First Amendment *demands* rules permitting as many to speak and be heard as possible. And if this Commission does not enact them, then the courts must require them.

The anology to broadcasting should be clear. Yet, we have permitted a system of broadcasting to develop in this country in which private licensees serve, not only as "moderators" for the electronic forums of communication, but as all the "speakers" as well. As the majority states, our limited frequencies require someone to serve as "public trustees." No one would deny this need for a "trustee" system. But that is not the issue. The issue is whether that "trustee" must control *all* the available time, or whether policy and the First Amendment require him, in a manner consistent with his other duties, to turn over reasonable portions of that time directly to the people.

In many ways, broadcasters have resolved this issue themselves. For *they* have created a system in which immediate access is granted to one, privileged class of applicants: the commercial peddler of goods and services. As the system now operates, any person wishing to sell products—toothpaste or "feminine deodorant spray," for example—has direct, personal and instant access to television. He can present his message, in the form he wishes —not in terms of "issues" (the general benefits of toothpaste or deodorant), but in terms of individual products.

He is not forced to rely upon a "trustee" to argue the cause of his product for him under some principle of the fairness doctrine—an occasional mention on the evening news, or a Sunday afternoon talk show. He does it personally and directly.

No, our Rules of Order for radio and television are fantastically skewed. We have an individual right of access, all right, but only for hucksters of industrial garbage. Anyone wishing to discuss war, peace, mental health, or the suffering of the poor, must seek out a corporate "trustee," appointed by the government, to speak for him. But the corporations that have largely contributed to these social ills can defend their wares directly. With the help of Congress and the FCC, the broadcasting industry in this country has built perhaps the most beautiful, efficient, and effective "marketplace of ideas" ever conceived and executed. The industry finds it most profitable, however, to use that marketplace only for the sale of products—not the robust, wide open debate of a free society. And the FCC finds this in "the public interest"!

II

The majority has addressed the first issue—the right to solicit funds via short announcements—in ambiguous fashion. Stating that the three networks have grudgingly announced their willingness to accept such announcements, the majority responds: "We concur in that treatment." (Par. 30.) But how does this "concurrence" rule on the request before us—namely, that broadcasters be *required* to adopt such policies? The majority hints that a denial of such time to political parties outside normal election periods would appear "arbitrary," but does not explain why, nor detail the consequences of such arbitrariness. Because, however, the majority states that solicitation announcements are "appropriate" in this area, I conclude that they make the networks' recently adopted policies binding on them.

In a companion case to this decision, *Business Executives Move for Vietnam Peace (BEM)*, FCC 70-860, Aug. 6, 1970, I have stated in detail my position that a broadcaster cannot accept commercial advertisements, yet reject advertisements which are political in nature. I believe the principles there stated are directly applicable to advertisements soliciting funds for political parties. I will not repeat them here, but merely incorporate them by reference. For reasons detailed in that opinion, I concur in the majority's decision to require licensees to accept advertisements by political parties soliciting funds.

I dissent, however, to the majority's position that broadcasters should not be required to offer time for short announcements to *all* persons for *any* purpose. As I have argued in my *Business Executives* opinion, once a licensee opens his forum to the presentation of commercial views, he cannot then close it in a discriminatory fashion—accepting some commercial views and political solicitations, but rejecting all others. I point out only that the Commission's partial waiver for the DNC to permit it to purchase fund-raising spot announcements only increases the arbitrariness and discrimination involved in denials of access to political parties for short announcements on current issues, or announcements by groups or individuals either soliciting funds or stating positions on national problems.

In *Wirta* v. *Alameda-Contra Costa Transit District*, 434 P. 2d 982 (Cal. 1967), for example, a public transit company sold advertising space in its buses for commercial products, but refused to accept an advertisement by Women for Peace, which simply stated:

> "Mankind must put an end to war, or War will put an end to mankind."—President John F. Kennedy . . .

Stating that the political "advertisement" was clearly protected by the First Amendment, the court flatly or-

dered the company to accept the advertisements for display.

> [A]dvertising is an acceptable and effective means of communication. A regulation which permits those who offer goods and services for sale . . . access to such forum, while denying it to those who desire to express other ideas and beliefs, protected by the First Amendment, cannot be upheld.

Wirta, supra, at 990. The "vice" of censorship lay in "choosing between classes of ideas," accepting commercial ones and banning all others. Every other court faced with the same issue has followed this position. See, *e.g.*, *Hillside Community Church, Inc.* v. *City of Tacoma*, 455 P. 2d 350 (Wash. 1969); *Zucker* v. *Panitz*, 299 F. Supp., 102 (S.D.N.Y. 1969); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 328 (S.D.N.Y. 1967). The application of this arm of the law to broadcasting is relatively new and as yet undeveloped and unapplied. But see *United Broadcasting Co.* (WHKC), 10 F.C.C. 515 (1945). I have attempted to show that these cases clearly apply to broadcasting in my *Business Executives* opinion.

The lesson of these cases is clear. The Government could not, for example, allow persons selling products to speak freely in public parks, but bar those opposing the war or require them to "speak" through an interpreter or "trustee" appointed by the Government. No court in the land would tolerate such blatant discrimination. Yet the majority permits this sort of discrimination to occur every day in our nation's electronic "public parks." Although we do not have the question before us, a broadcaster might not have to open his forum to advertising at all. But once he does, he must open it in an even-handed manner—absent some compelling showing of detriment or disruption to his normal programming services. No such evidence on this issue has been supplied to us.

I believe this Commission (perhaps for a two-year trial period) should require broadcasters to accept, up to recognized limits on numbers of commercials, *all* advertisements, whether commercial or political, from *any* person, for broadcast at rates determined by the licensee, on a first-come, first-served basis. If ghetto residents of our major cities wish to purchase announcements decrying the rat-infested, disease-ridden slums in which they are forced to live, they must be given their say. If the Daughters of the American Revolution wish to announce their support for the Vietnam War, they must be given their say. In short, I would open the broadcast spectrum to short announcements from all comers on a first-come, first-served basis. There will be time later to assess and evaluate—to consider, for example, whether the views of the rich predominate—at least, to a greater extent than they now predominate in mass media advertising. I would not expect any fairness doctrine problems. Few licensees would argue that they were unwilling to accept an advertisement because it might force them to present all views on an issue of controversy and public importance. This obligation is already incumbent upon them. And should the fairness doctrine prove unworkable in this field, it could be suspended for this type of programming.

III

The Commission also denies the DNC the right to purchase, at the going rates, half-hour or full-hour programming to discuss issues of national concern. I disagree. If broadcasters are to permit a General Motors or a Ford Motor Company, in effect, to purchase a full hour of "I Love Lucy" as a vehicle upon which to display their commercials, then I do not see how, consistent with the principles enunciated in *Wirta* and other cases, the broadcasters can refuse to permit the leading representatives of our legislative branch of government to purchase the equivalent hour to display their ideologies and concerns.

I would require licensees to accept programming of a political nature, if offered, in an amount up to 5% of their prime time evening schedule on a first-come, first-served basis. Assuming four hours of prime time every evening (from 7:00 p.m. to 11:00 p.m.), and calculating 30 days per month, that would release six hours per month to "pure access" by politicians and citizens groups alike. The individual licensee would, of course, still retain the right to reject programming for inadequate technical and production quality, or violation of federal law (lotteries, obscenity, etc.). But I would assume that programming purchased by the national political parties would, almost per se, meet any pre-established quality standards. Licensee profits would remain at their present high level. And there will be time later to assess this scheme and determine the extent to which fairness doctrine obligations apply. The fairness doctrine could be suspended in this limited area, on the assumption that persons wishing to respond could purchase the necessary reply time. Obviously this 5% figure is only an initial, approximate determination, and obviously any other reasonable percentage determined by the licensee would also be approximate. But the point is that licensees could not reject *all* programming.

The majority essentially raises several objections to such a procedure. First, they argue that this would permit those with "strong financial resources" to pre-empt time and distort the presentation of issues. And they maintain that the views of the wealthy would dictate the agenda of national debate. I disagree. The short answer is that the wealthy already set the agenda for national debate, and a partial "access-for-purchase" procedure would only open a closed system to partial dissent. A longer answer, however, is simply that I have more faith in the theoretical "marketplace of ideas" than does the majority. I am not aware that opening the pages of newspapers or magazines, or the wall space of buses, train stations or subway platforms, have resulted in a

preponderance of "wealthy" views. And I do know that the "Political advertising" that appears in daily newspapers—urging, for example, citizens to write the President in support or opposition of the Vietnam war—is more stimulating and thought-provoking than those of department stores and food chains. All in all, I do not see any imbalance in that system of "print" access. Why should we expect it in radio and television?

But more importantly the dissemination even of "false" or one-sided political ideas often serves a socially useful purpose. False commercial ideas (such as the notion that modern cars are "safe," or do not pollute the air) are unlikely to generate opposing claims; at best, they merely goad competing manufacturers into more and more extravagant claims. On the other hand, expressions of political opinion in this country usually lead to argument and debate, not silent acquiescence; to vigorus opposition, not passive acceptance. And debate and dissent is always healthy. John Stuart Mill saw this over 100 years ago, and I do not believe the passing century has proven him wrong:

> The peculiar evil of silencing the expression of opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

J. S. Mill, *On Liberty*, quoted in *Buckley* v. *Meng*, 230 N.Y.S. 2d 924, 932 (Sup. Ct. 1962). Given a system in which the small citizen and the man of moderate means are totally cut out from a system of communication, therefore, I believe a partial access system might move a small way toward righting the present imbalance.

The majority's second justification for its position is that we have a limited number of frequencies, and that some "trustee" must necessarily exercise control over broadcasting time. Any other system would result in chaos. Again, this begs the question. Merely because a "trustee" or "gatekeeper" must control some of the time, I see no compelling reason why he must control *all* of it. Broadcasters have essentially abdicated this "trustee" authority to commercial advertisers, gobbling up sponsors as rapidly as they approach, and limiting themselves only by the commercial maximums suggested for radio and television. They have also, on occasion, sold entire hours to sponsors such as Xerox or National Geographic to present their own programming. The question before us, therefore, is whether the present system of broadcasting could function with a *partial* system of access, leaving the vast bulk of programming still under the control of the networks and individual licensees. Nothing the majority has said convinces me that this is impossible.

The third reason given by the majority is that Section 3(h) of the 1934 Communications Act prevents licensees from being treated as a "common carrier." There are many defects in this position, some of which I have dealt with in my dissenting opinion in *Business Executives*, FCC 70-860, Aug. 6, 1970. Some are as follows.

First, the legislative history of this provision suggests that the drafters of the 1934 Act were concerned only that Title II of the Act, "Common Carriers," and its rather complicated system of regulation, not be imposed on radio. No one would argue that a partial access system would have this result.

Second, Congress wrote into the 1934 Act the concept that broadcast licensees must serve the "public interest, convenience, and necessity." And it goes without saying that the basic principles of the First Amendment are also incorporated implicitly into the Act. We do not have to declare unconstitutional Section 3(h) of the Act to say

that broadcasters must treat persons wishing to do business with it equally. We have ruled in our *Letter to Nicholas Zapple*, FCC 70-598 (1970), for example, that even apart from Section 315(a) considerations, there may be only one appropriate person or spokesman that can satisfy the fairness doctrine obligation imposed upon broadcasters in certain situations. Does this violate Section 3(h) of the Act, by taking from the licensee choice over the person that uses his facilities? Of course not. A limited system of access for purchase is perfectly consistent with Section 3(h) of the Act, the "public interest," and the First Amendment. Indeed, the First Amendment may require such a system or some reasonable facsimile.

Third, a reasonable system of access does not make broadcasters into common carriers. A doctrine preventing broadcasters from rejecting all persons wishing to submit political advertising or other programming does not force licensees to accept everyone. Obviously broadcasters can establish reasonable limitations on the amount of time he will offer other persons. See *United Broadcasting Co.* (WHKC), 10 F.C.C. 515 (1945). The First Amendment does not establish any particular proportion on percentage figure; it does require, however, that broadcasters devote *some* "reasonable" portion of their time to "access" programming.

IV

The matters before us go far beyond freedom of speech. For in the last analysis, we are confronted with one of the most serious challenges to the system of "checks and balances," the separation of the legislative and executive powers of government, that our country has ever faced. If, for example, through some bizarre turn of events the President, but not the Congress, was granted access to the computer, the telephone, the telegraph, the typewriter, the printing press, and the Xerox machine, we

would also see a constitutional quandry of the proportions that face us now. The President has immediate, direct and vivid access to all the minds of the prime-time television viewers in America. Can our tri-partite scheme of government survive if the Congress receives substantially less?

Unlike the fairness doctrine, which often imposes a burden on broadcasters due to the importance of the *issue* to the public, principles of pure "access" pay their own way. The broadcasting industry is out-of-pocket nothing. The great mass of news, documentary and entertainment programming will be unaffected. And the forums of the air will be opened to the breeze of dissent, controversy, and thought.

Unlike the fairness doctrine, an "access" system is self-enforcing. No governmental agency is called upon to decide which issues are controversial and of public importance. Issues reach the public immediately, without the years of delay required to push a fairness doctrine controversy through the Commission and the courts.

And, unlike the present system, the views that reach the people will not be dominated by the consensus committees of the corporate television establishment. There are some who fear that the agenda of debate will be set by the rich. But who, after all, sets that agenda now? The great mass of television programming consists of format entertainment series, carefully designed as supportive and palatable packaging for the commercial content supplied by the merchandisers of our land. To the extent a network seeks to provide programming which is "offensive" to some corporate interest, then pressures for censorship are brought to bear—as Coca Cola is alleged to have pressured NBC over its recent documentary on migrant workers. All we can hope for is a system of access in which at least a small percentage of the time and views will originate directly from the people—of

all views, persuasions, and walks of life. That even that modest participation is anathema to the broadcasters is testimony to their dangerous arrogance and unrestrained power. Accordingly, I dissent to today's Commission action.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE

No.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

DEMOCRATIC NATIONAL COMMITTEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States and the Federal Communications Commission, prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit entered in these cases on August 3, 1971.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–47a) is not yet officially reported. The opinions of the Federal Communications Commission are reported at 25 F.C.C. 2d 242 and 25 F.C.C. 2d 216 (Apps. B and C, *infra*, pp. 48a–90a and 91a–154a).

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1971, and reissued on October 29, 1971 (App. D, *infra*, pp. 155a–156a). A timely petition for rehearing and suggestion for rehearing *en banc*, was denied by the court on October 4, 1971 (App. E, *infra*, pp. 157a–158a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the powers granted to it by the Federal Communications Act, and in light of the inherent limitations on the broadcast spectrum, the Federal Communications Commission, which under its "Fairness Doctrine" requires broadcast licensees to originate programs involving controversial issues of public importance, must, because of the First Amendment, also require that the licensees sell time to individuals and groups for the advertising of their particular views.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech * * *.

Section 3(h) of the Communications Act of 1934, 48 Stat. 1064, *et seq.*, as amended, 47 U.S.C. 153(h), provides:

> "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

Section 315(a) of the Communications Act of 1934, 48 Stat. 1088, as amended, 73 Stat. 557, 47 U.S.C. 315(a), provides:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to

political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

STATEMENT

These cases arise out of two orders of the Federal Communications Commission, concerning claims that radio and television broadcasters cannot refuse to sell any broadcast time for the discussion of controversial issues. In each instance the complainant sought time to present its own views, without regard to whether the station licensee had otherwise fulfilled its affirmative and continuing obligation under the Commission's fairness doctrine to inform the public on questions of public importance by presenting representative and contrasting views.

In *Business Executives' Move for Vietnam Peace* (BEM), a national organization sought to purchase time for one-minute anti-Vietnam War announcements on radio station WTOP, Washington, D.C. The station declined to sell the time on the ground that it was against its policy to sell spot time for the discussion of controversial issues. It explained that such subjects "require a more in-depth analysis than can be provided in a 10, 20, 30 or 60 second announcement" (App. C, p.

92a). Moreover, it claimed before the Commission that it had carried, through a variety of spokesmen in different formats, the views of both proponents and opponents of the war, including the views embodied in the proposed BEM announcements (App. C, pp. 94a–95a).

In *Democratic National Committee* (DNC), that organization sought a declaratory ruling that "[a] broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues" (App. B, p. 48a). DNC did not request relief against any particular station.

The Commission ruled on the two matters in related opinions issued on the same day. With respect to WTOP's claim that it had given substantial coverage to various opinions on the war, the Commission noted that this had been challenged by "no more than a general allegation" to the contrary, and held that this was an insufficient basis upon which to require WTOP to undertake a burdensome demonstration of its compliance with the fairness doctrine (App. C, pp. 97a–99a). It rejected the two complainants' common contention that, for constitutional and other reasons, time must be sold to groups seeking to air their particular views about controversial public issues.

The Commission held that such a requirement would be inconsistent with its fairness doctrine and is not mandated by the First Amendment or by the system of private broadcasting established by Congress.[1] It

[1] In *Business Executives' Move for Vietnam Peace*, the Commission relied primarily on its basic and more extensive analysis in *Democratic National Committee* (App. C, pp. 101a–102a).

pointed out that Congress expressly chose not to make a broadcaster a common carrier (47 U.S.C. 153(h)) and had instead approved (47 U.S.C. 315(a)) the Commission's policy known as the fairness doctrine, under which licensees are regarded as trustees of the public interest charged with an affirmative responsibility of informing the public about representative community views on issues of great public importance (App. B, pp. 62a–65a). Emphasizing the Court's endorsement of this doctrine in *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission,* 395 U.S. 367, the Commission stated that this responsibility necessarily vests in each licensee a broad discretion to determine the issues to be discussed, the spokesmen that will speak, and the format to be used (App. B, pp. 58a–65a).

The Commission concluded that the paramount First Amendment right of the public to be informed, recognized by the fairness doctrine and in *Red Lion* (395 U.S. at 390), is best served by continued reliance on licensee discretion rather than by conferring upon members of the public qualified rights of access to a communications medium which inherently is not available to all (App. B, pp. 64a–72a). In the Commission's view, the alternative would pose difficult problems for licensees in maintaining a balanced facility for the discussion of public issues, would give persons with substantial financial resources undue influence in the determination of the use of that facility, and would endanger the principle that free time must be provided, if necessary, to redress an

imbalance in coverage[2] (App. B, pp. 65a–67a). The Commission cautioned broadcast licensees, however, that a "policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner would run counter to the 'profound national commitment that debate on public issues should be uninhibited, robust, and wide-open,'" citing, *inter alia*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (App. B, p. 61a).[3]

Upon petitions for review filed by BEM and DNC pursuant to Section 402(a) of the Communications Act, 47 U.S.C. 402(a), the court of appeals, with Judge McGowan dissenting, reversed. The court held that "a flat ban [by licensed broadcasters] on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted" (App. A, p. 3a). Although recognizing that the physical limitations of broadcast time necessarily restrict access to the airwaves, the court concluded that within these limitations there is nevertheless "a reasonably regulated, 'abridgeable' right to speak" (App. A, p. 22a). This abridgeable interest, in the court's view, derives from the public's right to receive ideas and information (App. A, p. 20a), the public's "First Amendment interest in the

[2] See *Cullman Broadcasting Co., Inc.*, 40 F.C.C. 576.

[3] The Commission also ruled that time should be made available for sale to significant political parties to solicit funds, in view of the importance of viable parties and the fact that the *Cullman* principle, *supra*, n. 2, is not applicable to the political party areas (App. B, pp. 72a–75a). See *Letter to Nicholas Zapple*, 23 F.C.C. 2d 707.

mode or manner—as well as the content—of public debate aired on the broadcast media" (App. A, p. 21a), and "the interest of individuals and groups in effective self-expression" (App. A, p. 22a). Since editorial advertising involves some initiation and control of the broadcast by the advertiser, it directly serves the First Amendment interest in wide-open debate and self-expression; by contrast, the court deemed exclusive control by licensees over the initiation and editing of broadcasts on controversial issues to be "inimical to the First Amendment" (App. A, p. 24a). For this reason, the Commission's reliance on the duty of licensees to originate such broadcasts, subject to the fairness doctrine, was held to be constitutionally insufficient (App. A, p. 24a, n. 34). Moreover, the court held that if commercial advertising is sold at all, a total ban against editorial advertising by broadcasters violates the First Amendment because such a ban discriminates against controversial speech in favor of commercial speech (App. A, 29a–36a).

The court found unpersuasive the fears of the Commission and the broadcasters that only those with the greatest wealth would be able to purchase time and thereby enjoy the "abridgeable" right of access; that licensees might lose control of their programming; and that the fairness doctrine's requirement that contrasting views to editorial advertising be presented free of charge (if necessary) might seriously impair the financial base of broadcasting. These arguments, the court stated, misconceived the narrowness of the issue: the permissibility of a total ban by broad-

casters on editorial advertising. The court ordered the Commission to develop reasonable guidelines governing acceptance of editorial advertisements by broadcasters (App. A, pp. 36a–43a) and remanded the cases to the Commission for this purpose (App. A, p. 44a).

Judge McGowan, dissenting, stated that the responsibilities of broadcast licensees to present controversial views on issues of public importance, subject to the fairness doctrine, satisfied the requirements of the First Amendment. He noted that "This is the system which Congress has, wisely or not, provided as the alternative to public ownership and operation of radio and television communications facilities. * * * It is hardly the path of wisdom to scrap it for a system in which money alone determines what issues are to be aired * * *" (App. A, 46a). He concluded that "within the context of a regulatory scheme which has made provision for the airing of controversial issues of public importance," the First Amendment permits, but does not require, licensees to accept paid editorial advertising. (App. A, pp. 46a–47a.)

REASONS FOR GRANTING THE WRIT

Because the broadcast spectrum is limited, its use must be regulated to accommodate the interests of all, lest in the "cacaphony of competing voices" none will be clearly heard. *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 376. No individual, therefore, and no group has "an unabridgeable First Amendment right to broadcast comparable

to the right of every individual to speak, write or publish." *Id.* at 388. "It is the right of the viewers and listeners * * * which is paramount." *Id.* at 390. How this objective is to be achieved involves choices among various means of accommodating the public's interest in maintaining freedom of speech with the inherent physical limitations on access to the airways. In the public interest standards of the Communications Act of 1934, and in the 1959 amendment to Section 315 of that Act, Congress charged the Federal Communications Commission with the primary responsibility to make these choices. The decision of the court of appeals in this case substantially encroaches upon that responsibility. It in effect transfers the making of the basic policy judgment from the Commission to the courts, and, in so doing, sets a new and significant course for broadcasting. The importance of this case thus lies not only in the immediate consequences of the court's decision for radio and television broadcasting, but also in the implications of that decision for the proper role of the Commission and the courts in the regulatory system Congress has legislated.

Over the years, as radio and television have assumed greater importance in our society, the Commission's responsibilities have concomitantly increased and a regulatory system has evolved. The Commission, with the subsequent approval of both Congress (47 U.S.C. 315(a)) and this Court (*Red Lion, supra,* at 386–401), has concluded that under the Communications Act broadcast licensees must conduct themselves as public

trustees.[4] They have the duty both to give adequate coverage to public issues and to assure that that coverage fairly and accurately reflects opposing views. See, *e.g.*, Report on *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246; *Fairness Primer*, 29 Fed. Reg. 10415; *Network Programming Inquiry*, 25 Fed. Reg. 7291; Primer on *Ascertainment of Community Problems by Broadcast Applicants*, 36 Fed. Reg. 4092. These duties are grounded on the licensees' statutory obligation "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance," 47 U.S.C. 315(a).

In this limited respect, the freedom of broadcast journalism is, because of the inherent physical limitations of the broadcast spectrum, subordinated to the public's interest in hearing diverse views. See *Red Lion, supra.* Moreover, the Commission has made clear that "[a] licensee policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner would run counter to the 'profound national commitment that debate on public issues should be uninhibited, robust, and wide-open'" (App. B, p. 61a). The consequence of failure to meet this obligation is, as Judge McGowan recognized, loss of the right to broadcast (App. A, p. 46a).

The court of appeals, however, held that the First Amendment demands more. In the court's view, there is a limited First Amendment right of access. But

[4] See also *Office of Communications of the United Church of Christ* v. *United States*, 359 F. 2d 994 (C.A.D.C.).

the limited right is itself abridgeable; not all members of the public can exercise it and, indeed, the court ruled that the plaintiffs in these cases are not necessarily entitled to present their views on the air (App. A, p. 2a). Instead, the court ordered the Commission to adopt regulations that would govern the selling of time for editorial advertising in light of the court's holding that licensees must make some time available for such advertising. The court thus recognized that in broadcasting the available time must be apportioned in some manner among those who want to present views of public importance.

Given the common First Amendment objective of both the court and the Commission, the court's holding is, in substance, simply a disagreement with the Commission about how best to make that apportionment. For the Commission's concern has always been with ensuring the "right of the public to receive *suitable access* to social, political, esthetic, moral and other ideas and experiences," *Red Lion, supra,* 395 U.S. at 390 (emphasis added). But this collective right of the public depends on what constitutes "suitable access" and that is a practical question, peculiarly suited to administrative determination, which Congress has left primarily with the Commission. Indeed, by basing its disagreement with the Commission on constitutional grounds, the court has not only significantly restricted the ability of the Commission to regulate this important medium of communication in accordance with the agency's informed views of how the public interest will best be served, but has in effect also held that Congress itself is without power to change the court's result.

Congress has chosen to promote broadcasting within the structure of the private enterprise system and, in light of the inherent limitations on access to broadcasting, has expressly declared in Section 3(h) of the Act that licensees are not common carriers (47 U.S.C. 153(h)). Indeed, it has also declared that "no obligation is imposed upon any licensee to allow the use of its station by any [political] candidate." 47 U.S.C. 315(a). Within this statutory structure, careful decisions must be made in regulating the use of broadcast time. In *Red Lion*, the licensees argued that the Commission had gone too far in protecting the rights of listeners and had thereby violated the licensees' First Amendment rights; in this case, groups wishing to express their views on the air claim the Commission has not gone far enough in securing their right to speak and the public's interest in hearing speech. Both cases required the Commission to render a determination in light not only of the regulatory system that Congress had legislated and that, over the years, the Commission had developed, but also of the various interests that must be accommodated within the existing structure of broadcasting. Here the Commission again carefully articulated the practical and legal basis for its policy and concluded that the public's interests in broadcasting are best served by vesting the licensees with broad discretion to discharge their important responsibility of presenting the public with diverse views (App. B, pp. 57a–72a, App. C, pp. 100a–103a).[8] The Commission's de-

[8] Because of this duty, the cases involving access to a regulated forum relied upon by the court of appeals are inapposite. *Lee* v. *Board of Regents of State Colleges*, 306 F. Supp. 1097 (W.D. Wis.), affirmed, 441 F. 2d 1257 (C.A. 7); *Zucker* v.

cisions here constitute a reaffirmation of the approach it has evolved in the twenty years since television and radio came of age.[6]

Panitz, 299 F. Supp. 102 (S.D.N.Y.); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y.); *Hillside Community Church, Inc.* v. *City of Tacoma*, 455 P. 2d 350 (Wash.); *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Reptr. 430, 434 P. 2d 982 (Cal.). These are all cases in which those responsible for access to an advertising forum have no corresponding responsibility to assure balanced coverage of contending positions; nor are there special considerations, as here, which suggest that such an obligation should be imposed. In those cases, the question was simply whether the ideas expressed in editorial advertising were to be given access to the forum at all. Under broadcasters' public interest obligations and the fairness doctrine, however, controversial questions of public importance must be given access to the broadcast forum, although in a format that is subject to licensee discretion.

[6] The Commission's 1945 decision in *United Broadcasting Co.*, 10 F.C.C. 515, relied on by the court of appeals (App. A, pp. 42a–43a), reflects the Commission's view before it had fully articulated licensees' duties under the fairness doctrine. Its basic report on ***Editorializing by Broadcast Licensees***, 13 F.C.C. 1246, was not adopted until 1949; and its *Fairness Primer*, 29 Fed. Reg. 10415, was not published until 1964. Moreover, the statutory public interest standard has always been construed as requiring the licensee itself to determine what programming is in the public interest, *Regents of New Mexico* v. *Albuquerque Broadcasting Co.*, 158 F. 2d 900, 905–906 (C.A. 10), and claims of a private right to have material broadcast have been consistently rejected by the courts. *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F. 2d 597, 600–601 (C.A. 3), certiorari denied, 327 U.S. 779; *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F. 2d 497, 501 (C.A. 1). See also *David Green* v. *Federal Communications Commission*, 447 F. 2d 323 (C.A.D.C.), noting (*id.* at 328) that "no individual member of the public has the right of access to the air; the licensees may exercise their judgment as to what material is presented and by whom."

What further adjustment and changes are desirable or possible may be considered in the Commission's pending general inquiry into the fairness doctrine.[7] But even if the Commission should reach a result similar to that ordered by the court of appeals, it will have done so only after careful and thorough consideration of the evidence and opinions elicited in this inquiry. The financial burdens on the licensees, whether and to what degree the licensee would be able to control the views and the manner in which they are expressed, the amount of time that should be allocated to controversial advertising, how disputes regarding refusal to sell time to a certain group would be resolved, on what basis a licensee could reject certain controversial advertising—all these factors and many more would have to be taken into account in determining not only what kind of regulations the Commission should adopt to implement a rule requiring that licensees accept public issue advertising, but also whether such a rule should be adopted at all.

The need for engaging in this kind of far-reaching and thorough inquiry before making such a signficant regulatory decision is precisely why Congress decided to create an administrative agency to handle the task. In this case, however, the court has, in Judge McGowan's words, attempted to "dictate the result in advance."[8]

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[7] Notice of Inquiry and Notice of Proposed Rule Making in Dkt. No. 18859, 23 F.C.C. 2d 27, 35 Fed. Reg. 7820; Notice of Inquiry in Dkt. No. 19260, 30 F.C.C. 2d 26, 36 Fed. Reg. 11825.

[8] Indeed, the reasoning of the court of appeals' opinion, which is based on the proposition that "the crucial controls" must be in the hands of the purchaser of time (App. A, p. 23a),

This Court has frequently commented on the impropriety of efforts by a reviewing court to fore-ordain through *ad hoc* determination an agency's orderly development of policy by commanding the adoption of the court's own policy views. *American Lines* v. *L. & N. R. Co.*, 392 U.S. 571, 591–593; *United States* v. *Saskatchewan Minerals*, 385 U.S. 94; *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20.

This allocation of functions between court and agency is not rendered inapplicable here by the court of appeals' conclusion that a licensee's acceptance of commercial advertising, without also accepting editorial advertising, is unconstitutional discrimination against "preferred" speech. Given the inevitable limitations on access to broadcasting, the question of discrimination is more meaningfully viewed in terms of how the licensee allocates air time between commercial uses and public issue speech, rather than in terms of the format he chooses. The licensees' public interest duty under the fairness doctrine assures that broadcasters, which derive their basic revenues from

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seems to suggest that it would be impermissible to refuse to sell advertising time on the ground that a similar viewpoint has already been adequately presented (App. A, pp. 26a–27a), on the ground that the matter is unimportant (App. A, p. 24a), and perhaps even on the ground that, short of a finding of clear and present danger, the content is unsuitable for entry into the home (App. A, p. 30a). In light of the emphasis on licensee responsibility for the content and overall fairness of its programming in the Commission's regulatory tradition, the Commission's task in attempting meaningfully to implement the decision below would thus be formidable at best (see Judge McGowan's dissenting opinion at App. A, pp. 44a–47a).

commercial advertising, will also devote substantial air time to controversial issues of public importance. There is, therefore, no invidious discrimination against the broadcasting of what the court below called preferred speech.[9]

The court of appeals' decision will have far-reaching effects on the broadcast industry. Each refusal to sell time for editorial advertising will raise potential constitutional questions presumably to be resolved initially by the Commission and ultimately by the courts. Under the Commission's current approach complaints about a licensee's performance in fairly presenting issues of public importance are resolved when raised and evaluation of the licensee's overall performance is undertaken upon complaint at license renewal time. It would now be necessary for the Commission either to provide hasty guidelines or to face a deluge of complaints from innumerable parties denied the right to broadcast their particular editorial advertising during the limited broadcast time available. The First Amendment is not necessarily served by making a government agency the arbiter of who shall speak and who shall not. Cf. 47 U.S.C. 326. Yet that is the role the court of appeals now thrusts upon the Commission, even though it does not seem to be a role Congress intended for the Commission. See 47 U.S.C. 153(h); 47 U.S.C. 315(a); 47 U.S.C. 326.

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[9] For this reason, cases such as *Cox* v. *Louisiana*, 379 U.S. 536; *Fowler* v. *Rhode Island*, 345 U.S. 67; and *Niemotko* v. *Maryland*, 340 U.S. 268, are inapplicable.

CONCLUSION

The issues are important, and well worthy of this Court's consideration. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1972.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

No. 24492

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS
POST-NEWSWEEK STATIONS, CAPITAL AREA, INC., INTERVENOR

No. 24537

DEMOCRATIC NATIONAL COMMITTEE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS
AMERICAN BROADCASTING COMPANIES, INC. and COLUMBIA BROADCASTING SYSTEM, INC., INTERVENORS

Petitions for Review of Orders of the Federal Communications Commission

Decided August 3, 1971

Before WRIGHT, MCGOWAN and ROBINSON, Circuit Judges

Opinion filed by WRIGHT, Circuit Judge
Dissenting opinion filed by MCGOWAN, Circuit Judge

WRIGHT, *Circuit Judge:* In these cases we are asked to decide whether a broadcast licensee may, as a gen-

eral policy, refuse to sell any of its advertising time to groups or individuals wishing to speak out on controversial public issues. The Federal Communications Commission concluded that such a policy is permissible.[1] We reverse the Commission's decision. And we remand for further proceedings.

The principle at stake here is one of fundamental importance: it concerns the people's right to engage in and to hear vigorous public debate on the broadcast media. More specifically, it concerns the application of that right to the substantial portion of the broadcast day which is sold for advertising. For too long advertising has been considered a virtual free fire zone, largely ungoverned by regulatory guidelines. As a result, a cloying blandness and commercialism—sometimes said to be characteristic of radio and television as a whole—have found an especially effective outlet. We are convinced that the time has come for the Commission to cease abdicating responsibility over the uses of advertising time. Indeed, we are convinced that broadcast advertising has great potential for enlivening and enriching debate on public issues, rather than drugging it with an overdose of non-ideas and non-issues as is now the case.

Under attack here is an allegedly common practice in the broadcast industry—airing only those paid presentations which advertise products or which deal with "noncontroversial" matters, and confining the discussion of controversial public issues to formats such as the news or documentaries which are tightly controlled and edited by the broadcaster. In the Commission's view, an attack on the permissibility of this practice

[1] *Business Executives Move for Vietnam Peace*, 25 F.C.C. 2d 242 (1970); *Democratic National Committee*, 25 F.C.C. 2d 216 (1970).

"goes to the heart of the system of broadcasting which has developed in this country."[2] We disagree. The actual issue before us is relatively narrow and we decide it narrowly. We do not have to cut to the "heart" of our system of broadcasting; we leave undisturbed the licensee's basic right to exercise judgment and control in public issue programming and the sale of advertising time. All we do is forbid an *extreme* form of control which totally excludes controversial public debate from broadcast advertising time.

We hold specifically that a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted. We do not hold, however, that the planned announcements of the petitioners—or, for that matter, of any other particular applicant for air time—must necessarily be accepted by broadcast licensees. Rather, we confine ourselves to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many "editorial advertisements" will be put on the air.

I

Both petitioners in these cases are organizations whose primary *modus operandi* is public persuasion and communication. As a rule, they do not attract attention to their views by performing newsworthy acts, such as engaging in civil disobedience or organizing mass demonstrations. They depend, instead, on their ability to get a hearing—as full as possible and as direct as possible—from the general public. Surely radio and television would seem to be the most effective

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[2] *Democratic National Committee, supra* Note 1, 25 F.C.C. 2d at 221.

media for their purposes. Yet they contend that their self-expression on those media—and, therefore, the public's access to their views—is significantly inhibited by broadcaster policies barring any and all paid editorial messages from the airwaves.

The Business Executives Move for Vietnam Peace (BEM) is a national organization of over 2,700 business owners and executives, organized in opposition to the war. BEM apparently believes that it is in a position to offer the public a unique viewpoint on what is no doubt one of the great political and moral issues of our time. In order to communicate that viewpoint, it prepared several recorded one-minute radio announcements. The announcements urged "immediate withdrawal of American forces from Vietnam and from other overseas military installations" and featured statements by leading businessmen and retired military officers whose views may carry particular weight with the general public. BEM sought to buy time to air these announcements on the broadcast media, just as commercial advertisers do. It must have seemed an extraordinarily effective means of directly communicating its ideas and sense of urgency to the broad listening audience.

In June 1969 BEM sought to purchase time for its announcements on WTOP, an all-news radio station in the nation's capital. Like most broadcasters, WTOP sells substantial amounts of time for short advertisements. Yet over a period of eight months it repeatedly refused to sell any time to the business executives. WTOP cited no particular objection to the planned announcements. Rather, it relied solely upon an across-the-board policy barring all editorial advertisements—"its long established policy of refusing to sell spot announcement time to individuals

or groups to set forth views on controversial issues."[3] BEM then filed a complaint with the Federal Communications Commission alleging violations of both the fairness doctrine and the First Amendment.

The Democratic National Committee (DNC) came to the Commission with much the same sort of complaint. It stated that it was in the process of planning an extensive media campaign to communicate the Democratic Party's views on crucial issues and to solicit funds. In our political system, it is of obvious importance that the public have access—as direct and full as possible—to the views of the political parties. A party currently out of office may well regard such communication as particularly vital. Yet DNC alleged that it confronted several obstacles to diret self-expression on the broadcast media, among them the refusal of some broadcasters to sell time for comment on controversial public issues. Unlike the business executives, DNC did not complain of any individual refusal to sell time for a particular editorial advertisement. Rather, it cast the issue in a somewhat different light by seeking a declaratory ruling from the Commission that "[a] broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitations of funds and for comment on public issues."

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[3] WTOP also stated "that 'subjects of this type require a more in-depth analysis than can be provided in a 10, 20, 30 or 60 second announcement.'" *Business Executives Move for Vietnam Peace*, *supra* Note 1, 25 F.C.C. 2d at 242. There is no indication, however, that WTOP's "long established policy" of refusing to sell time for *any* controversial advertisement would have permitted it to sell BEM 5 minutes or 10 minutes for a more "in-depth" treatment of its antiwar views. For a discussion of the permissibility of a flat ban on "short" public issue advertisements, *see* text at pages 28–29 *infra*.

The Commission considered the two cases together and rejected the arguments of both BEM and DNC on the same day. The isues involved did not overlap completely. For example, the Commission found a defect in the vagueness and generality of BEM's fairness doctrine complaint,[4] and it resolved DNC's contention concerning fund solicitation by noting that all three television networks had agreed to accept such solicitations and by stating that any broadcaster policy of confining solicitations to election periods alone "would appear arbitrary." [5] On the matters

[4] In its original complaint, BEM alleged generally that WTOP had failed to cover antiwar views fully and fairly. However, it offered no specific proof whatever of its allegations, and WTOP, on the other hand, offered a lengthy compilation of news and interview shows which aired the opinions of some antiwar groups and individuals. BEM has not pressed its fairness doctrine argument on appeal, but rather has relied solely upon the First Amendment right-of-access contention which it also made before the Commission. Therefore, we need not consider here the Commission's holding that BEM failed to shoulder its full burden of going forward under the fairness doctrine.

[5] All three television networks also commented on the sale of time for editorial advertising. CBS stated it would sell no time for such advertising, although an exception would be made for broadcasts on behalf of political candidates or ballot propositions. ABC said it would not sell time to most groups for public issue advertising since that would inspire a "flood" of requests, but it would "be prepared, consistent with its other obligations, to accept such orders for time from major political parties as can be accommodated on a reasonable basis." And NBC stated it "has no policy which would prevent the purchase of program time envisioned by DNC." We are constrained to note here that any discrimination in the sale of editorial advertising time in favor of political parties alone or the "major" political parties—and totally excluding other more issue-oriented groups or "minor" political parties—would be highly suspect under the First Amendment. *See* text at pages 33–35 *infra*.

central to these petitions for review, however, the Commission resolved both cases in the same fashion, and we, therefore, are also considering them as one.

The Commission held that it is permissible for a broadcast licensee to follow a general policy of rejecting all editorial advertisements. The essence of its reasoning in the two cases was as follows: First, it interpreted the fairness doctrine to allow rejection of paid controversial announcements. The doctrine, evolved by the Commission and endorsed generally in the Communications Act, demands that all controversial issues of public importance be covered both fully and fairly by broadcasters. Yet the Commission held that it leaves the licensees broad leeway to exercise their professional judgment as to "the format for presentation of controversial issues 'and all others facets of such programming.' " Editorial advertising, the Commission said, is simply one of several possible formats for coverage of public issues. Under the permissive "reasonableness" standard of the fairness doctrine, acceptance of that particular format is by no means compulsory.

Second, the Commission interpreted the First Amendment to be equally permissive. Its reasoning on this point was rather sparse. It made no effort, for example, to identify the peculiar First Amendment interests attaching to paid editorial announcements as opposed to coverage of controversial issues on news, interview or discussion programs. Instead, it was content to raise the spectre of the "chaos" and other practical difficulties that, it said, would attend a right of access to the broadcast media. The Commission concluded that the fairness doctrine's requirement of full and fair coverage—tolerant as it is of a flat ban on the editorial advertisement format of expression—

provides as much protection of public debate as the First Amendment demands.

Before this court, both petitioners make substantially the same attack on the Commission's decision. They do not ask for a ruling that *all* editorial advertisements submitted to broadcasters must be accepted. Nor do they seek to foreclose entirely the broadcasters' exercise of reasonable discretion. What they advocate is a *limited* right of access to radio and television for paid public issue announcements. They attack the Commission's ruling that a total exclusion of such announcement is permissible.

II

Petitioners have left no stone unturned in their attack on the exclusion of editorial advertising. They have invoked the Communications Act's "public interest" requirement [6] and the statutory-regulatory fairness requirement [7]—as well as First Amendment principles—to support their argument. In other contexts, we might attempt to avoid the constitutional issue by coming to a decision on nonconstitutional grounds. But that course is neither fruitful nor possible here.

Speaking specifically of the Commission, the Supreme Court has stressed the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 381 (1969). Thus the nonconstitutional question here is whether

[6] 47 U.S.C. §§ 307(d), 309(a) (1964).

[7] 47 U.S.C. § 315(a) (1964). For a discussion of the regulatory development of the fairness doctrine and its eventual adoption in the Communications Act, *see Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 375–381 (1969).

there are "compelling indications" that the public interest and fairness requirements compel some opening for public issue advertisements on radio and television. In matters of allocating burdens, reforming procedures and ensuring full attention to all relevant factors in agency decision making, we have not been reluctant to reverse the Commission in order to vindicate "the public interest."[8] We have also intervened to see that broad policies developed by the Commission under the fairness doctrine are applied fully and consistently to all cases.[9] However, when we are asked to reverse major substantive interpretations of the grand and open-ended statutory requirements, we tread somewhat more difficult terrain. Obviously, the requirements mean something and there must be a great range of actions which they foreclose to the Commission; but, in establishing the necessary guidelines, we must ourselves seek extrinsic guidance.

In these cases, that guidance comes from the Constitution. Petitioners have presented no "compelling" evidence from legislative history to indicate a congressional policy in favor of, or even a real congressional attention to, editorial advertising. Rather, their arguments on the nonconstitutional points closely parallel their constitutional arguments. The general policy considerations which they invoke encompass all of the interests that would have to be evaluated under the relevant First Amendment law. It would make no sense for us to blind ourselves to the constitutional status of those interests and to the doctrine that has been built up around them.

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[8] *See, e.g., Office of Communication of United Church of Christ* v. *F.C.C.*, 123 U.S. App. D.C. 328, 359 F. 2d 994 (1966); 138 U.S. App. D.C. 112, 425 F. 2d 543 (1969).

[9] *See, e.g., Retail Store Employees Union, Local 880* v. *F.C.C.*, —— U.S. App. D.C. ——, 436 F. 2d 248 (1970).

What then might be the "compelling indications" we are to consider? The ones which seem to us truly "compelling" involve First Amendment principles. Thus we conclude that the constitutional question must be faced and is, indeed, the essence of these cases. Whether our decision is styled as a "First Amendment decision" or as a decision interpreting the fairness and public interest requirements "in light of the First Amendment" matters little.

III

It has always been clear that the broadcast media—so vital to communication in our society—are affected by strong First Amendment interests.[10] Yet the nature of those interests has not been so clear; an evolution of constitutional principles in this area is still very much in progress. Until quite recently, the only interest raised to constitutional status was that of the broadcast licensees themselves. In a leading case, the Commission's powers over program content were attacked and upheld with reference solely to the licensees' right of immunity from governmental interference with their "speech." The scarcity of broadcast frequencies was said to justify some regulation trenching on the broadcasters' First Amendment interests. *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943). These cases mark a new effort by members of the public to assert *their* First Amendment interests in the operations of radio and television.

There is scant precedent for such an effort. Indeed, the few previous attempts by individuals or groups to

[10] *See, e.g., United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948). Congress itself has prohibited any interference by the Commission with "the right of free speech by means of radio communication." 47 U.S.C. § 326 (1964).

enforce their First Amendment interests in court have failed. In each case, the litigants have run up against not only an unreceptiveness to their constitutional theory, but also a crabbed judicial view of "state action"—a view that the "[First] Amendment limits only the action of Congress or of agencies of the federal government and not private corporations such as [broadcast licensees]." *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 1 Cir., 183 F.2d 497, 501 (1950); *McIntire* v. *Wm. Penn Broadcasting Co. of Philadelphia*, 3 Cir., 151 F. 2d 597, 601 (1945). *See also Post* v. *Payton*, E.D. N.Y., 323 F.Supp. 799 (1971).

We believe the path is now clear of such doctrinal impedimenta. Perhaps the most important recent development is the Supreme Court's seminal decision in *Red Lion Broadcasting Co., supra.* There the Court upheld another aspect of the Commission's regulation of program content—the fairness doctrine's personal attack and campaign editorial rules. However, the Court's opinion went well beyond the scarcity rationale of the *National Broadcasting Co.* case. It justified the Commission's interference with broadcasters' free speech by invoking specifically constitutional rights of the general public which, it said, underlie and support the fairness doctrine rules at issue. Issuing what must become a clarion call for a new public concern and activism regarding the broadcast media, the Court stated that "the people as a whole retain their * * * collective right to have the medium function consistently with the ends and purposes of the First Amendment." [11] It went on to say:

"* * * The right of free speech of a broad-

[11] 395 U.S. at 390.

caster * * * does not embrace a right to snuff out the free speech of others. * * *

* * * * *

"* * * [A] licensee has no constitutional right * * * to monopolize a radio frequency to the exclusion of his fellow citizens. * * *

* * * * *

"* * * It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. * * *"[12]

Of course, the *Red Lion* Court had to invoke the public's First Amendment interests for a narrow purpose only—to uphold legislative and administrative action already taken. It did not have to reach the issue, presented in these cases, of invoking those interests for a direct attack on broadcasters' policies approved by the Commission. However, the language used by the Court is significantly expansive. It spoke of a First Amendment "right" held by "the people as a whole." A constitutional "right" is hardly deserving of the name if it can function only to *permit* legislative and administrative action and if its content depends entirely upon the current policies of the legislative and executive branches. The First Amendment, after all, contains nothing analogous to the fifth section of the Fourteenth Amendment, authorizing Congress to enforce constitutional interests unenforceable by the courts.[13]

For many purposes, it is proper to consider broadcast licensees as "private" businesses. Yet, for purposes

[12] *Id.* at 387, 389, 390.

[13] On the effect of the specific language in the fifth section of the Fourteenth Amendment, *see Oregon* v. *Mitchell*, 400 U.S. 112 (1970); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). Of course, the Fourteenth Amendment does not apply to federal regulation of the broadcast industry, since no interference with the states is involved.

of the First Amendment, "[o]wnership does not always mean absolute dominion." *Marsh* v. *Alabama,* 326 U.S. 501, 506 (1946). "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans* v. *Newton,* 382 U.S. 296, 299 (1966). The *Red Lion* Court itself commented on the impermissibility of "private censorship" and cited old doctrine that " '[f]reedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.' "[14] The reach of the First Amendment, therefore, depends not upon "public"—"private" technicalities, but upon more functional considerations. They are (1) the governmental involvement in or public character of a particular enterprise, and (2) the importance or suitability of that enterprise for the communication of ideas.[15]

[14] 395 U.S. at 392, quoting *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945).

[15] Most "state action" cases, of course, have been concerned with equal protection rights under the Fourteenth Amendment rather than with free speech rights under the First Amendment. However, the principle of governmental involvement developed therein has been applied equally well in the First Amendment context. *See, e.g., Public Utilities Comm'n* v. *Pollak,* 343 U.S. 451 (1952); *Farmer* v. *Moses,* S.D. N.Y., 232 F. Supp. 154 (1964). The principle of "public character" may be found in decisions dealing directly with application of First Amendment rights to "private" entities. *See, e.g., Marsh* v. *Alabama,* 326 U.S. 501 (1946); *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308 (1968); *Tanner* v. *Lloyd Corp.,* D. Ore., 308 F.Supp. 128 (1970); *Diamond* v. *Bland,* 91 Cal. Rptr 501, 477 P. 2d 733 (1970). The importance and suitability of a particular place for the communication of ideas has been stressed in all of the cases cited above, as well as in all of the access-to-public-forum cases, *see* Notes 40–43 *infra.*

The last few decades of court decisions expanding the concept of "state action" have focused on myriad indicia of governmental involvement and public character. Many of them are apparently applicable to the operations of the broadcast industry.[16] But we need stress only two more basic factors which, taken together, bring broadcast licensees well within the ambit of the First Amendment for the purposes of these cases. First, the general characteristics of the broadcast industry reveal an extraordinary relationship between the broadcasters and the federal government—a relationship which puts that industry in a class with few others.[17] It is one of "interdependence" and "joint participa[tion]." See *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961). "[T]he [federal] regulatory system," it has been said, "is as much responsible for the existence of a broadcasting medium as the Bureau of Engraving is respon-

[16] Dissenting in the BEM case now under review, Commissioner Johnson dealt exhaustively with the Supreme Court's state action doctrine, isolating eight separate indicia of "state action." He argued very strongly that all eight indicia apply to broadcast licensees. *Business Executives Move for Vietnam Peace*, *supra* Note 1, 25 F.C.C. 2d at 253–264. Because this highly analytical—one might say mechanical—approach runs the risk of reading Supreme Court opinions for more than they mean, we have chosen to paint with a broader brush. Ours is the approach which the Supreme Court seems in fact to have used in the past.

[17] In particular, broadcasting may be easily distinguished from the newspaper industry in terms of "state action." In two recent decisions, courts have held that newspapers are not subject to the First Amendment. *Associates & Aldrich Co., Inc.* v. *Times Mirror Co.*, 9 Cir., 440 F. 2d 133 (1971); *Chicago Joint Board* v. *Chicago Tribune Co.*, 7 Cir., —— F. 2d ——, 39 U.S. L. WEEK 2360 (December 17, 1970). While the governmental involvement in and public character of newspapers in surely less than that of broadcasting, we of course need express neither agreement nor disagreement with the cited decisions here.

sible for the existence of United States currency." [18] It has long been recognized that the airwaves are "a limited and valuable part of the public domain," [19] leased out temporarily by the federal government which retains ultimate control over them.[20] Federal agency review and guidance of broadcasters' conduct is automatic, continuing and pervasive.[21] For broadcast licensees are considered the "proxies" or "fiduci-

[18] Pemberton, *The Right of Access to Mass Media*, in N. Dorsen (ed.), The Rights of Americans 277, 290 (1971). The Government is also directly responsible for the very existence of particular broadcasters. "[E]xisting broadcasters have often attained their present position because of their initial government selection in competition with others * * *. * * * [Their present] advantages are the fruit of a preferred position conferred by the Government." *Red Lion Broadcasting Co.* v. *F.C.C.*, *supra* Note 7, 395 U.S. at 400.

[19] *Office of Communication of United Church of Christ* v. *F.C.C.*, *supra* Note 8, 123 U.S. App. D.C. at 337, 359 F. 2d at 1003.

[20] The licensing-out or delegation of governmental authority has been an element in some of the Supreme Court's most expansive state action decisions. *See Evans* v. *Newton*, 382 U.S. 296 (1966); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Smith* v. *Allwright*, 321 U.S. 649 (1944). The mere existence of a licensing or delegation relationship is not, of course, enough by itself to establish state action; licensed pharmacists cannot be equated with licensed broadcasters. The actual extent of governmental involvement and the public character of the enterprise in question remain the final tests of state action.

[21] The activities of a governmental regulatory agency have also been emphasized in at least one of the Supreme Court's expansive state action decisions. *See Public Utilities Comm'n* v. *Pollak*, *supra* Note 15, 343 U.S. at 462, *citing American Communications Ass'n* v. *Douds*, 339 U.S. 382, 401 (1950) ("[W]hen authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself.").

aries" of the people.[22] Almost no other private business—almost no other regulated private business—is so intimately bound to government and to service to the commonweal.

A second and even more important factor is the *specific* governmental involvement in the broadcasters' action now under review here. All of the cases in which previous courts have characterized broadcasters as mere "private corporations" immune from First Amendment constraints, *see* text at page 12 *supra,* have involved direct suits against broadcast licensees. In the cases before us now, however, the Commission has given its imprimatur to the flat ban on editorial advertising. It specifically considered and specifically authorized the flat ban. Thus we are called upon to review not simply a private decision, but a decision by a government agency, a decision which must inevitably provide guidance for future broadcaster action.

There is ample authority for the principle that specific governmental approval of or acquiescence in challenged action by a private organization indicates "state action."[23] Indeed, in a case similar to

[22] *See Red Lion Broadcasting Co.* v. *F.C.C.*, *supra* Note 7, 395 U.S. at 394, 396; *Office of Communication of United Church of Christ* v. *F.C.C.*, *supra* Note 8, 123 U.S. App. D.C. at 337, 359 F. 2d at 1003.

[23] The Supreme Court has said that "action of state courts and judicial officers in their official capacities is to be regarded as action of the State * * *." *Shelley* v. *Kraemer*, 334 U.S. 1, 14 (1948). *See New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 DUKE L. J. 219, 227–230. *See also* this court's discussion of the *Shelley* principle—which surely must apply to actions of a federal administrative agency specifically approving private action—in *Edwards* v. *Habib*, 130 U.S. App. D.C. 126, 397 F. 2d 687

ours the Supreme Court held that a private bus company franchised by the federal government and regulated by the District of Columbia Public Utilities Commission could be subject to First Amendment constraints. It emphasized the specific regulatory acquiescence in the challenged action of the bus company:

> "* * * In finding [state action] we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. We do, however, recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. We rely particularly upon the fact that that agency, pursuant to protests against the [challenged action], ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby. * * *"

Public Utilities Commission v. *Pollak,* 343 U.S. 451, 462 (1952). (Footnote omitted.)

Broadcasting's importance and suitability for communication of ideas need not be labored. Mere presence of large and appropriate audiences (and thus opportunities for effective communication) has sometimes been emphasized by the courts to show the rel-

(1968). Specific governmental acquiescence, as well as specific approval, has also been a focus of Supreme Court state action decisions. *See Marsh* v. *Alabama, supra* Note 15, 326 U.S. at 507 & n. 4. 509; *Burton* v. *Wilmington Parking Authority, supra* Note 20, 365 U.S. at 725.

evance of First Amendment protections.[24] In *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), for example, the Supreme Court held that a privately owned shopping center was an appropriate place for the "speech" of labor union picketers. It stressed "[t]he large-scale movement of the country's population from the cities to the suburbs [that] has been accompanied by the advent of the suburban shopping center * * *." *Id.* at 324. With this demographic change, the "speech" that once took place on the public streets around downtown shopping areas must be allowed to move to privately owned parking areas in the suburbs, for that is where the relevant audiences now are. The technological and cultural changes connected to the current preeminence of the broadcast media as our primary means of communication are no less striking. The soap box orator and the leafleter are becoming almost obsolescent; their Saturday afternoon audiences have increasingly moved indoors—in front of their television sets.[25]

Moreover, unlike most of the private entities held to be subject to First Amendment constraints, the broad-

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[24] *See, e.g., Wolin* v. *Port of New York Authority*, 2 Cir., 392 F. 2d 83, 90–91 (1968) ("The propriety of a place for use as a public forum * * * [may be established if] the place is where the relevant audience may be found."). Of course, the cases before us involve the right to speak on a *medium* of communication, but not in a particular *place*. Thus many of the considerations are different; but the basic concern with the ability to reach the relevant audience applies in both situations.

[25] The Supreme Court has noted that broadcast "technology * * * supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news * * *." *Red Lion Broadcasting Co.* v. *F.C.C.*, *supra* Note 7, 395 U.S. at 386 n.15.

cast media are specifically dedicated to communication. They function as both our foremost forum for public speech and our most important educator of an informed people. In a populous democracy, the only means of truly mass communication must play an absolutely crucial role in the processes of self-government and free expression, so central to the First Amendment. That can be said of almost no other "private" enterprise.

IV

Broadcast licensees, then, serve not only as "speakers" but also as administrators of a highly valuable communications resource, subject to First Amendment constraints. Their dual role demands that their own constitutional interests in free speech coexist with those of the general public. But what are the dimensions of the public's First Amendment interests in the operation of radio and television? And how do they apply to the issue of editorial advertising?

It is particularly important that these cases deal only with the public's First Amendment interests in broadcasters' allocation of advertising time. They deal only with time relinquished by broadcasters to others; petitioners argue only that, in relinquishing that time, broadcasters must not discriminate against protected expression. In normal programming time, closely controlled and edited by broadcasters, the constellation of constitutional interests would be substantially different. In news and documentary presentations, for example, the broadcasters' own interests in free speech are very, very strong.[26] The Commission's fairness doctrine properly leaves licensees broad leeway for professional judgment in that area. But in the allocation of advertising time, the broadcasters have no

[26] *See id.* at 396.

such strong First Amendment interests. *Their* speech is not at issue; rather, all that is at issue is their decision as to which other parties will be given an opportunity to speak.

Though the broadcasters themselves have no substantial First Amendment interest in the allocation of advertising time, we might expect that the interest of members of the public—potential advertisers—would be quite strong. However, the Commission and the broadcaster-intervenors have argued just the opposite. They contend that the public's constitutional concerns do not extend to advertising time. Thus we must decide whether the substantial block of the broadcast day devoted to advertising is but a vacuum, devoid of First Amendment constraints, in the midst of a medium powerfully affected by those constraints—a desert in the midst of an oasis.

The Commission and intervenors work from the following premise. They define the public's overall constitutional interests in the operations of radio and television quite narrowly. The public's only interest, they suggest, is as viewers and listeners—not as speakers. They cite to us the *Red Lion* Court's mention of "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences" over the broadcast media.[27] And they read that statement to set forth not only *an* interest of the public, but the *only* interest of the public.

Working from that premise, the Commission and intervenors contend that the public already receives "suitable access" to controversial views on normal programming time. Application of the fairness doctrine's requirement of full and fair coverage of public issues in non-advertising time, they suggest, ensures that all views on these issues will in fact be presented.

[27] *Id.* at 390.

They assume that editorial advertising adds nothing new to the debate. The fairness guarantee alone, they say, is enough to eliminate petitioners' claim on advertising time—and enough to satisfy the First Amendment. We disagree.

Surely the public's interest in free access to the full spectrum of ideas and controversial views on radio and television is highly important. The right to receive ideas and information is deeply rooted in First Amendment law.[28] The *Red Lion* Court stressed that right, since it was the one primarily relevant to the fairness doctrine rules at issue in the case. But we do not believe that the *Red Lion* decision makes the goal of an informed public the exclusive First Amendment interest constraining broadcasters. Certainly the Supreme Court has done so in no other context.

The public has a First Amendment interest in the mode or manner—as well as the content—of public debate aired on the broadcast media. The *Red Lion* Court itself stated specifically that "[i]t is the purpose of the First Amendment to preserve an *uninhibited* marketplace of ideas [in the broadcast media]."[29] This court, similarly, has said that the Commission is obliged to administer the airways "in such a manner that * * * debate on public issues is 'uninhibited, robust and wide-open.'" *National Ass'n of Theatre Owners* v. *F.C.C.*, 136 U.S. App. D.C. 352, 365, 420 F. 2d 194, 207 (1969). The reference to "uninhibited" debate is, of course, borrowed from the Su-

[28] *See Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); *Lamont* v. *Postmaster General*, 381 U.S. 301, 307–308 (1965) (Mr. Justice Brennan, concurring); *Martin* v. *City of Struthers*, 319 U.S. 141, 143 (1943). The "right to receive," however, has not been considered the central First Amendment interest, and never the only First Amendment interest.

[29] 395 U.S. at 390. (Emphasis added.)

preme Court's decision in *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964). The Court there extended First Amendment protection to some forms of libel on public officials. It made clear that the Amendment's concern extends beyond the mere fostering of speech whose content will properly inform the public. The *New York Times* decision establishes a strong First Amendment interest in vigorous, "wide-open" public debate.

Furthermore, we must take note of a third—but, perhaps, most important—First Amendment interest. That is the interest of individuals and groups in effective self-expression. The *Red Lion* Court did say that "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." [30] For, as it pointed out, broadcast time is necessarily limited. But the limited nature of broadcast time does not dictate that the individual and group interest in self-expression be brushed aside entirely; it allows for a reasonably regulated, "abridgeable" right to speak. The First Amendment values of individual self-fulfillment through expression and individual participation in public debate have long been recognized.[31] We all have an interest in speaking up ourselves as well as in hearing others. It is too late to argue that the First Amendment protects ideas but not an individual's interest in expressing them and doing so in his own way.

We conclude, then, that the public's First Amendment interests constrain broadcasters not only to provide the full spectrum of viewpoints, but also to present them in an uninhibited, wide-open fashion and to provide opportunity for individual self-

[30] *Id.* at 388.

[31] *See, e.g.*, T. Emerson, Toward a General Theory of the First Amendment 4–7 (Vintage ed. 1967).

expression.[32] How do these three First Amendments interests relate to a more specific interest in the airing of editorial advertisements? The answer emerges when we understand the special importance of advertising time to our system of free expression. First, the initial decision to produce an editorial advertisement is in the hands of members of the public. The initiative to present a particular view does not have to come from a member of the broadcaster's staff. Second, a paid advertisement is basically controlled and edited by the advertiser. He is allowed to present his views in a fashion chosen by himself. If an individual is interviewed for a news program, he may expect his comments to be abbreviated and edited; reporters' commentary will qualify what he has to say. For it is the broadcasters' responsibility to be objective, to condense issues into available time for presentation, and to play up or play down views according to the *broadcaster's* opinion of what is important and interesting. But when an individual or group buys time to say its piece, the crucial controls are in its own hands. Editorial advertising is thus a special and separate mode of expression, not simply a duplication of other expression on the same medium.[33]

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[32] Of course, all three of these interests apply to non-advertising time as well as to advertising time. The Commission, in fact, has encouraged broadcasters to present conflicting views through partisan voices as well as through predigested commentary. *See Democratic National Committee*, *supra* Note 1, 25 F.C.C. 2d at 222–223. However, as we make clear in text, the selective edited presentation by the Government's licensee of partisan voices on news shows, for example, does not erase the *special* advantages of allowing self-selected partisan voices on advertising time.

[33] *See* text at pages 27–29 & Note 37 *infra*. *See also* Note, *A Fair Break for Controversial Speakers: Limitations of the Fairness Doctrine and the Need for Individual Access*, 39 GEO. WASH. L. REV. 532, 557–560 (1971).

The importance of initiative and control to the First Amendment interests in wide-open debate and individual self-expression should be obvious. Vigorous, free expression is promoted when members of the public have *some* opportunity to take the initiative and editorial control into their own hands on the broadcast media. It has traditionally been thought that the best judge of the importance of a particular viewpoint or issue is the individual or group holding the viewpoint and wishing to communicate it to others. In the First Amendment area, our best guarantee has always been a "free market" in which partisans who feel strongly on particular issues may decide on their own to speak out and to speak out in their own way. The present system, allowing a flat ban on editorial advertising, conforms instead to a paternalistic structure in which licensees and bureaucrats decide what issues are "important," how "fully" to cover them, and the format, time and style of the coverage.

Even if broadcasters were to succeed in presenting a full spectrum of viewpoints and partisan spokesmen on non-advertising time, their retention of *total* initiative and editorial control is inimical to the First Amendment. The importance of fair, objective and full treatment of controversial issues on normal programming cannot be doubted. But, as the Supreme Court has said in the context of classroom debate, "supervised and ordained discussion" is not enough. *Tinker* v. *Des Moines School District,* 393 U.S. 503 (1969). "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Keyishian* v. *Board of Regents,* 385 U.S. 589, 603 (1967). In other words, there is always a strong First Amendment interest in opening up

channels for more spontaneous, self-initiated, self-controlled expression.[34]

[34] We are cognizant of current proposals to reform the Commission's fairness doctrine and invigorate its enforcement, so lackluster in the past. We commend the Commission's consideration of new rules to "encourage and implement" presentation of opposing viewpoints by reemphasizing the obligation to "seek out" controversial issues. *Obligations of Broadcast Licensee Under the Fairness Doctrine*, 35 FED. REG. 7820 (1970). But, as the Commission says, the proposed rules would be but a "modest * * * step in promoting access to the media." *Id.* at 7821. They go little beyond the present obligation to give "full" coverage to controversial issues. Such an obligation is inherently difficult to define and enforce. At best, the Commission can evaluate only the *general* willingness of a licensee to "seek out" issues and glaring examples of noncoverage of obviously important issues. The Commission cannot be expected to engage licensees in fine debates over coverage of less obviously life-or-death issues. But the fundamental point—the point we emphasize—is that no matter how "fully" controversial issues might be covered in a perfect broadcasting world, the basic initiative and control remains with the licensee. Because there is not even a partial "free market" opening to the public at large, the crucial First Amendment interests in decentralized initiative and control go unsatisfied.

We realize that there is another possible, but purely speculative, reformation of the fairness doctrine now under consideration which might be supposed to obviate the need for a measure of "free market" access to advertising time. It has been proposed that licensees be required to provide self-edited advertising time to groups or individuals under the fairness doctrine only when a commercial advertiser has already taken a controversial position in his broadcast messages. Such an approach has been taken regarding cigarette advertisements, though that case was said to be extraordinary and not to establish a general precedent. *Banzhaf* v. *F.C.C.*, 132 U.S. App. D.C. 14, 405 F. 2d 1082 (1968). But even if that principle were made to apply generally, it would leave the initiative solely in the hands of commercial advertisers: the only issues on which noncommercial groups and individuals could speak through editorial advertisements would be those issues which commercial advertisers had already chosen to raise themselves. Allowing such a narrow group, motivated largely by busi-

Even in terms of the public's First Amendment interest emphasized by the Commission and intervenors—the interest of "viewers and listeners" in passive access to the full spectrum of viewpoints on radio and television—editorial advertising plays an important role. The concept of "full" coverage of "controversial" issues "of public importance" is vague to say the least, and leaves much to the broadcasters' discretion (and possible oversight).[35] Assuming that broadcasters are sometimes fallible, the goal of a fully informed public is best attained by opening of outlets for members of the public to supplement the licensees' assessments of "importance," "controversiality" and "full" coverage. The Commission's and intervenors' argument might be somewhat stronger if it were designed to support a partial ban on editorial advertising concerning issues and views which have *in fact* been substantially aired on normal programming time.[36] The argument is unconvincing, however, in support of a flat, *per se* ban on any and all editorial advertisements.

Moreover, even if "antiwar views," for example, have in fact been presented on news and interview

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ness profit, to set the agenda for editorial advertising is unconscionable and contrary to First Amendment precepts. It is crucial that noncommercial groups and individuals have the same rights of initiative as commercial advertisers.

[35] The guarantees of full and fair coverage have proved particularly difficult to define and enforce in the past. They have taken on effective meaning only in the most extreme cases of broadcaster irresponsibility. For a depressing critique of the Commission's apparent inability to enforce its own standards, *see* Cox & Johnson, *Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study*, 14 F.C.C. 2d 1 (1968).

[36] Even then, however, the special attributes of editorial advertising would not be eliminated by the broadcaster's own coverage. *See* text at pages 23–25 *supra* and pages 27–29 *infra*.

shows, it is not *necessarily* clear that a particular anti-war editorial advertisement would add nothing to the public's information and understanding. "Viewpoints" cannot be so neatly and infallibly catalogued as the Commission would have us believe. Self-expression and public debate are much more subtle phenomena; matters of style and intensity of feeling are important components.[37] Again, an across-the-board ban on editorial advertisements—leaving the quality of public debate in the control of one licensee, supplemented by no other autonomous inputs—may well ignore opportunities to enliven and enrich the public's overall information.

We recognize, of course, that the onesidedness and private editing of particular "spot" editorial advertisements may in the end steer viewers and listeners away from the "truth" by distorting complex issues. Being brief, these "spot" messages—no less than normal broadcast news coverage—may not canvass all possible arguments or develop all possible implications of the position they espouse. But that does not mean that

[37] In *Lee* v. *Board of Regents of State Colleges*, W.D. Wis., 306 F. Supp. 1097 (1969), *affirmed*, 7 Cir., 441 F. 2d 1257 (1971), the court held that a school newspaper was obliged under the First Amendment to print antiwar editorial advertising, even though antiwar views could be printed in the newspaper's news and letters-to-the-editor columns. The court stressed the qualitative—and valuable—difference in expression of views through an editorial advertisement. "It is readily apparent," it said, "that a paid advertisement can be cast in such a form as to command much greater attention than a letter to the editor. Large type, photographs, repeated publication and full pages of space are some of the modes of expression available in an editorial advertisement that might not be available in a letter to the editor." *Id.* at 1101. Another court has come to the same result in a newspaper editorial advertising case. *Zucker* v. *Panitz*, S.D. N.Y., 299 F. Supp. 102 (1969). *See* text at pages 31–32 *infra*.

they are unprotected by the First Amendment. Our Constitution protects many forms of misleading and overly simplified political expression in order to ensure robust, wide-open debate. "[N]either factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct * * *." *New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 273. Nor does the brevity of the criticism. We must, then, be very, very slow to judge any sort of speech on public issues worthless. The marketplace of ideas protected by the First Amendment, after all, is not governed by the tastes and intellectual standards of the universities or the broadcast newsroom—or even of judicial chambers.

We conclude, therefore, that the fairness doctrine's goal of full and fair coverage of issues on normal programming time does not eliminate the public's interest in a further, complementary airing of controversial views during advertising time. We must concur in the Supreme Court's only recorded comments on constitutional protection for editorial advertising—comments made in the context of newspapers, like broadcasting a medium which may be expected, if not required, to present the various sides of public issues in its non-advertising space. The Court said that editorial advertisements, unlike commercial advertisements,[38] are of fundamental First Amendment concern, since they deal with political questions. And it protected them from libel law attack to the same extent as the newspapers' own editorial columns, for

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[38] Commercial advertising—indeed, any sort of commercial speech—is less fully protected than other speech, because it generally does not communicate ideas and thus is not directly related to the central purpose of the First Amendment. *See Breard* v. *City of Alexandria,* 341 U.S. 622 (1951); *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942).

> "[a]ny other conclusion * * * might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. * * * The effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.' * * *"

New York Times Co. v. *Sullivan*, *supra*, 376 U.S. at 266.

V

We come now to the aspect of the broadcasters' policy which, petitioners say, trenches on the First Amendment interest in editorial advertising. The constitutional defect of that policy is somewhat ironic. The *New York Times* Court made clear that the fact distinguishing fully protected editorial advertising from less fully protected commercial advertising is that the former deals with controversial public issues. Indeed, the political nature of editorial advertising places it near the core of the First Amendment. However, the very characteristic which affords it strict constitutional protection is also the characteristic causing the broadcasters' challenged policy to single it out and exclude it from the airwaves. That, we believe, is the crucial aspect of these cases.

It is important to note that petitioners do not attack the exclusion of editorial advertising by broadcasters who accept no advertisements whatever.[39] We

[39] DNC's position is somewhat ambiguous. The ruling which it requested from the Commission would, by its terms, apply to all broadcasters, whether or not they accept any advertising. *See* text at page 6 *supra*. However, on appeal DNC's arguments have been focused entirely on broadcasters who do

do not have to decide whether the broadcast medium inherently amounts to a "public forum" on the order of public streets or parks or meeting halls or even bus terminals.[40] We leave open the possibility that broadcasters may constitutionally relinquish no time at all for advertising of any sort. For the issue in these cases is the permissibility of discrimination, within a given block of advertising time, against "controversial" speech and in favor of commercial and "noncontroversial" speech. We deal here with a forum that already has been opened up by the licensees themselves, opened up for direct broadcast presentations by members of the public.

Fortunately, we do not write on a clean slate in this area. Six courts have confronted discriminations among types of speech like the one challenged here. Every one of them—four federal courts and two state supreme courts—has held that once a forum, subject to First Amendment constraints, has been opened up for commercial and "noncontroversial" advertising, a ban on "controversial" editorial advertising is unconstitutional unless clearly justified by a "clear and present danger." *Lee* v. *Board of Regents of State Colleges*, W.D. Wis., 306 F. Supp. 1097 (1969), *affirmed*, 7 Cir., 441 F. 2d 1257 (1971); *Zucker* v. *Panitz*, S.D. N.Y., 299 F. Supp. 102 (1969); *Kissinger*

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already accept noncontroversial advertising. The interests of particular licensees in keeping all advertising off the air were not explored before the Commission or before this court—for example, an all music station may have a very substantial interest in broadcasting no paid announcements. Because the special issues relating to such licensees were not presented here, we do not decide them.

[40] *See, e.g., Schneider* v. *State*, 308 U.S. 147 (1939); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *Wolin* v. *Port of New York Authority*, *supra* Note 24. *See generally* Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 Sup. Ct. Rev. 1.

v. *New York City Transit Authority*, S.D. N.Y., 274 F. Supp. 438 (1967); *Hillside Community Church, Inc.* v. *City of Tacoma, Wash.*, 455 P. 2d 350 (1969); *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Rptr 430, 434 P. 2d 982 (1967). We join this unbroken line of authority.

First Amendment doctrine governing access to forums for communication has been elaborated often in recent years. The essential test is an exercise in balancing, though weighted in favor of First Amendment values.[41] On one hand, the court must assess the constitutionally protected interest in the particular expressive activity in the particular forum. On the other hand, it must assess the importance of other uses of the forum which may be threatened and the extent to which they actually will be disrupted. Access may be denied only if the disruption caused by a particular type of expression (*e.g.*, public speaking, marching, picketing) clearly overrides the "preferred" interest in free speech. Thus there is some right of access by demonstrators to state capitol grounds[42] but not to a jailyard.[43]

Ordinarily, courts have to make the basic balancing judgment on their own. However, when the adminis-

[41] Most of the cases, other than those cited above in text, have involved access to particular places in order to perform expressive activities such as speaking, leafleting, or demonstrating in some fashion. For general discussions of the cases and the principles applied, *see* H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT (paper ed. 1965); Note, *Regulation of Demonstrations*, 80 HARV. L. REV. 1773 (1967). There is no reason why the general principles applied in cases involving access to *places* should not apply to our cases involving access to a particular *medium* of expression. *See* Note 24 *supra*.

[42] *Cox* v. *Louisiana*, 379 U.S. 536 (1965).

[43] *Adderley* v. *Florida*, 385 U.S. 39 (1966).

trator of a forum has determined to grant access to some speakers or some picketers, he has implicitly made that basic judgment himself. When some public speaking is allowed in a park, the park's administrator has determined that the normal and proper functions of the park will not be excessively harmed by public speaking. If he then attempts to deny access to other public speakers, he cannot be heard to claim the opposite. The burden is on him to show some very substantial factor distinguishing the disruption they would cause from that caused by the speaking or picketing already allowed.

The same principle applies to broadcasters who have opened their forum to commercial speech but would close it to controversial political speech. By opening up a forum for some paid presentations, independently edited and controlled by members of the public, the broadcasters have waived any argument that advertising is inherently disruptive of the proper function of their stations. The exclusion of only one sort of advertising—which we have shown to have great First Amendment value—is then highly suspect, a *prima facie* constitutional violation. To justify the exclusion, there must be a substantial factor distinguishing the disruptive effect of editorial advertising from that of commercial advertising.

The content of the idea which the excluded speakers seek to promote is—emphatically—*not* permitted as a distinguishing factor in itself. Indeed, the existence of an exclusionary discrimination apparently based on the content of ideas presents an additional, or greatly heightened, *prima facie* constitutional violation. Both free speech and equal protection principles condemn any discrimination among speakers which is based on

what they intend to say." If the First Amendment prohibits anything at all, it must be a censorial discrimination among ideas. And since First Amendment rights have been held to be "fundamental rights" triggering the strict standard of review under equal protection principles, *Williams* v. *Rhodes*, 393 U.S. 23, 30–31 (1968), it is doubly clear that the burden of justifying any apparent discrimination is very great indeed.

At least 20 years ago, the Supreme Court began condemning discriminations among different exercises of the same type of expression. *Fowler* v. *Rhode Island*, 354 U.S. 67 (1953); *Niemotko* v. *Maryland*, 340 U.S. 268, 272–273 (1951). Both cases involved access to a forum already opened to others. More recently, the Court in *Cox* v. *Louisiana*, 379 U.S. 536 (1965), invalidated a state regulation that permitted labor picketing but not civil rights picketing. In his concurrence, Mr. Justice Black stated that this sort of discrimination is "censorship in a most odious form" and violates both the First Amendment and the equal protection clause. *Id.* at 581. Similarly, in *Adderley* v. *Florida*, 385 U. S. 39 (1966), the Court upheld a ban on demonstrations in a jailyard, but was careful to note that "[t]here is not a shred of evidence in this record * * * [the demonstrators were excluded] because the sheriff objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest." *Id.* at 47.

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[11] For discussions of the First Amendment-equal protection intersection, *see* Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1482, 1492–1497 (1970); Kalven, *supra* Note 40, 1965 SUP. CT. REV. at 29–30; Van Alstyne, *Political Speakers at Universities: Some Constitutional Considerations*, 111 U. PA. L. REV. 328, 337–339 (1963).

No doubt a discrimination against all controversial speech—such as we face in these cases—is somewhat less "odious" than a discrimination among different controversial viewpoints on particular issues. But it is a form of censorship just the same.[45] It is a favoritism toward the *status quo* and public apathy and, in these cases, a favoritism toward bland commercialism.[46] Such favoritism flies in the face of the First Amendment, whose central purpose is to protect and promote controversy, "uninhibited, robust and wide-open," on public issues.

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[45] In *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Rptr 430, 434 P. 2d 982, 986 (1967), the California Supreme Court came to the same conclusion as we do on this issue, saying:

"* * * The vice is not that the district has preferred one point of view over another, but that it chooses between classes of ideas entitled to constitutional protection, sanctioning the expression of only those selected, and banning others. Thus the district's regulation exercises a most pervasive form of censorship.

"* * * [T]he district's policy * * * affords total freedom of the forum to mercantile messages while banning the vast majority of opinions and beliefs extant which enjoy First Amendment protection because of their noncommercialism. No statistical data is required to demonstrate that in the totality of man's communicable knowledge, that which bears no relationship to material value preponderates."

The Supreme Court of Washington specifically adopted this view in *Hillside Community Church, Inc.* v. *City of Tacoma, Wash.*, 455 P. 2d 350, 353 (1969).

[46] Commissioner Johnson commented in his dissent that broadcasters "have created a system in which immediate access is granted to one, privileged class of applicants: the commercial peddler of goods and services. * * * We have an individual right of access, all right, but only for hucksters of industrial garbage." *Democratic National Committee*, *supra* Note 1, 25 F.C.C.2d at 233.

Moreover, it is by no means clear that a broadcasters' ban on "controversial" advertising does not impermissibly open the door to a *sub rosa* discrimination *among* controversial ideas. The term "controversial" is extraordinarily vague. Some advertisements may not be deemed "controversial"—and may not even be "controversial" for purposes of the fairness doctrine [47]—but may still express ideas, the negative of which would surely be labeled "controversial." [48] Ads for Radio Free Europe or Army recruiting, for example, may be allowed unanswered on the air, while ads calling the notion of the "free world" a sham or ads calling the Army a threat to democracy would be banned entirely. The line between ideological and nonideological presentations is an almost impossible one to draw. All too often in our society one particular ideology—that of passivity, acceptance of things as they are, and exhaltation of commercial values—is simply taken for granted, assumed to be a nonideology, and allowed to choke out all the rest.[49]

[47] See *Banzhaf* v. *F.C.C.*, 132 U.S. App. D.C. 14, 405 F.2d 1082 (1968): *Green* v. *F.C.C.*, —— U.S. App. D.C. ——, —— F.2d —— (Nos. 24470 & 24516, decided June 18, 1971).

[48] In *Wirta* v. *Alameda-Contra Costa Transit District supra* Note 45, 434 P. 2d at 987, the California Supreme Court made the same point very forcefully, and provided several telling examples:

"* * * A lumber company may advertise its wood products, but a conservation group cannot implore citizens to write to the President or Governor about protecting our natural resources. An oil refinery may advertise its products, but a citizens' organization cannot demand enforcement of existing air pollution statutes. An insurance company may announce its available policies, but a senior citizens' club cannot plead for legislation to improve our social security program."

[49] *See generally* C. Waxman (ed.), The End of Ideology Debate (1969).

Thus the editorial advertising ban, particularly when licensees accept advertising generally, establishes an unmistakable infringing of First Amendment liberties. The Commission and the broadcasters, then, bear a very heavy burden of justification. Whether we require a "compelling" justification, an "overriding" justification, or a "clear and present danger" is relatively unimportant.

VI

It being established that there is a strong and specific First Amendment interest in editorial advertising and that the policies discriminatorily barring such expression work a *prima facie* violation of constitutional principles, we must consider the countervailing considerations raised by the Commission and the broadcaster-intervenors. In order to justify the policy at issue, they must show some very substantial harm that would be caused by acceptance of editorial advertising—a sort of harm great enough to override the First Amendment interests at stake and a sort of harm not already involved in the acceptance of commercial and "noncontroversial" advertising. Only such a showing could convince us that the ban on editorial advertisements is supported by sufficient countervailing values and is not based solely on the content of the ideas conveyed.

The Commission and intervenors have begun from the assumption that our holding for petitioners would deprive broadcast licensees of their highly prized editorial independence and control over their frequencies, giving editorial advertisers a *right* to air time which commercial advertisers do not presently have. They have argued that petitioners seek the right to "grab the mike" from broadcasters' hands.[50] The

[50] Statement of attorney for intervenor Columbia Broadcasting System at oral argument before this court.

result, they say, would be a threefold disaster. First, they foresee "'a return to the chaotic situation of radio's early days'"[51] when too many hands grabbing for too few mikes made successful broadcasting impossible. Second, they argue that compulsory acceptance of editorial advertising would allow a few rich individuals or groups to buy up great blocks of time to purvey views on only one side of important issues, thus grossly unbalancing the broadcast station's treatment of those issues. And third, they point out that broadcasters compelled to accept editorial advertisements on one side of an issue would then be required by the fairness doctrine to accept at least some advertisements on the other side—free of charge if necessary. Provision of such free advertising time, they say would cut into the broadcasters' revenues and might bring financial collapse.

The arguments of the Commission and intervenors fall well short of the mark. The reason is that they have apparently misunderstood the narrowness of the issue here. All that we are considering is the permissibility of a total, flat ban on editorial advertising. All petitioners ask is that broadcasters be required to accept *some* editorial advertising. They do not advocate an absolute right to air their advertisements. As the *Red Lion Court* made clear, there could not be any such absolute right because advertising time, like all broadcast time, is severely limited. *See* text at page 23 *supra*. Under the Communications Act, broadcasters are not "common carriers" obliged to accept any advertising message that is submitted.[52] And peti-

[51] Brief for the Commission in Case No. 245,537 at p. 12.

[52] 47 U.S.C. § 153(h) (1964). The Commission and intervenors argue that this "common carrier" provision would be declared unconstitutional if we were to decide for petitioners in these cases. That, of course, is absolutely incorrect. The Commission

tioners do not argue that they should be. What petitioners do argue is that editorial advertisements should at least be considered and that some should be aired.

Such a modest reform would not substantially undermine broadcasters' editorial control over their frequencies. For broadcasters would retain full latitude to control the content of their programming. Their editorial control over non-advertising time would not be disturbed whatever. All that would be affected is their allocation of advertising time—an area in which *editorial* control over content has never been of major importance. The interest in deciding which advertisements to accept is not as great as in deciding what public issues to cover and how to cover them on news presentations, for example. *See* text at page 20 *supra*. It surely cannot be equated, as the Commission and intervenors suggest, with the interest of law review editors in deciding what articles to publish. *See Avins* v. *Rutgers, State University of New Jersey*, 3 Cir., 385 F. 2d 151 (1967), *cert. denied*, 390 U.S. 920 (1968). A broadcaster traditionally is not nearly as involved in the preparation and editing of advertisements as a law review staff is in the preparation and editing of articles.

Within the affected block of advertising time, neither chaos nor anything approaching chaos would

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and intervenors also point to a part of the Communications Act providing that if a station permits one candidate for office to use its facilities, it must then permit others equal time, but providing also that "[n]o obligation is imposed upon any licensee to allow the use of its station by any such candidate." 47 U.S.C. § 315(a) (1964). This statutory provision squares perfectly with our holding that a broadcaster is not necessarily obliged to provide any time for advertisements, but that if he does sell some advertising time he may not totally exclude editorial advertising.

follow the modest reform at issue. For, again, broadcasters would retain wide-ranging control. It is well established in First Amendment law governing access to forums that "reasonable regulations" may be promulgated and enforced to limit the exercise of free speech.[53] At the least, there may be regulations determining the time, place and manner of speech. They may not be used to stifle speech, but they are absolutely necessary to see that too many groups speaking at once do not drown out one another or trench overly much on the normal uses to which the forum is put by the public in general. The same principle applies to broadcasters' methods for allocating advertising time. All that petitioners condemn here are regulations providing that public issue advertising may be aired "at no time, in no place and in no manner" over the broadcast media.

Clearly, for example, broadcasters are entitled to place an outside limit on the total amount of editorial advertising they will sell. To fail to impose some such limit would be to deny the public the other sorts of programming which it legitimately expects on radio and television. Similarly, "reasonable regulation" of the placement of advertisements is altogether proper. No advertiser has a right to air his presentation at any particular point in an evening's programming. Nor does he have a right to clog a particular time segment with his messages. A relegation of all editorial advertising to non-"prime time" or any other major discrimination in the placement of editorial advertisements would no doubt go too far. But there is still room for broad exercise of the broadcasters' discretion.

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[53] *See, e.g., Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 320 (1968); Note, *supra* Note 15.

We need not define the precise control which broadcasters may exercise over editorial advertising. Rather, the point is that by requiring that *some* such advertising be accepted, we leave the Commission and licensees broad latitude to develop "reasonable regulations" which will avoid any possibility of chaos and confusion. The spectre of chaos and "mike grabbing" raised by the Commission and intervenors here is, as petitioners say, a "bogus issue." Broadcasters, after all, have dealt quite successfully with the scheduling problems involved with commercial advertising. We require only that noncommercial advertisers be treated in the same evenhanded way. Although many broadcasters already do allow editorial advertisements on the air, we have not been shown one reason, drawn from their experience, to suggest that chaos has resulted.

Beyond the mistaken suggestion of administrative apocalypse, the Commission and intervenors have raised a more plausible and important claim, involving the danger that a few individuals or groups might come to dominate editorial advertising time. Of course, the mere fact that wealthy people may use their opportunities to speak more effectively than other people is not enough to justify eliminating those opportunities entirely. It takes more money to operate a magazine or newspaper—or, for that matter, a broadcast station—than to buy a segment of time for an editorial advertisement. Yet we are not reluctant to provide strict First Amendment protection for the operators of magazines, newspapers and broadcast stations. The real problem, then, is not that editorial advertising will cost money, but that it may be dominated by only one group from one part of the political spectrum. A onesided flood of editorial advertisements could hardly be called the "robust, wide-

open" debate which the people have a right to expect on radio and television.

Again, however, invalidation of a flat ban on editorial advertising does not close the door to "reasonable regulations" designed to prevent domination by a few groups or a few viewpoints. Within a general regime of accepting *some* editorial advertisements, there is room for the Commission and licensees to develop such guidelines.[54] For example, there could be some outside limits on the amount of advertising time that will be sold to one group or to representatives of one particular narrow viewpoint. The licensee should not begin to exercise the same "authoritative selection" in editorial advertising which he exercises in normal programming. *See* text at pages 24–25 *supra*. However, we are confident of the Commission's ability to set down guidelines which avoid that danger.

We are no less confident of its ability to deal reasonably with the final problem it has raised—that relating to licensees' fairness obligations. Invalidation of a flat ban on editorial advertising, of course, leaves the Commission the power to require that if editorial advertisements are accepted on one side of an issue, then broadcasters must also accept at least some advertisements on the other side of the issue, free of charge if necessary. *See Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963). The result of such a reasonable regulation, however, need not be financial disaster. Indeed, it is incredible that the Commission would enforce a

[54] In the context of regulating demonstrations or picketing, guidelines which limit access because the same or similar groups had already had substantial access would be unusual and perhaps impermissible. However, the interest in maintaining some degree of balance on the broadcast media is particularly great. And "the characteristics of news media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co.* v. *F.C.C.*, *supra* Note 7, 395 U.S. at 386.

rule so rigid that licensees would be driven out of business.[55] If the obligation to provide some free time for answering editorial advertisements were shown to threaten actual financial harm to particular broadcasters, the Commission could make necessary adjustments.[56]

We conclude that none of the spectres raised by the Commission and intervenors—spectres of chaos, grossly unbalanced programming and financial disaster—is enough to justify a flat ban on editorial advertising. What real problems there are may be dealt with while the acceptance of *some* editorial advertisements is required. The keynote must be a scheme of reasonable regulation, administered by the licensee and guided by the Commission. At least in the past, the Commission has not considered this task so impossible. Twenty-five years ago it decided a case in which a union charged that a broadcaster was violating free speech rights by refusing to sell program time for the airing of controversial views. The Commission stated:

> "* * * The spirit of the Communications Act of 1934 requires radio to be an instrument of free speech, subject only to general statutory provisions imposing upon the licensee the responsibility of operating its station in the public interest. * * *

[55] We note that the Commission's requirement of free time for antismoking was administered generously toward the financial concerns of licensees and, indeed, few broadcasters seem to have been deterred from accepting cigarette commercials as a result. *See National Broadcasting Co., Inc.*, 16 F.C.C. 2d 947 (1969).

[56] *See* Note, *Fairness Doctrine: Television as a Marketplace of Ideas*, 45 N.Y.U. L. Rev. 1222, 1249 (1970). We must be somewhat skeptical of the talk about financial disaster. For, according to Commissioner Johnson, television broadcasters at least "*average* a 90 to 100 percent return on tangible investment annually." N. Johnson, How to Talk Back to Your Television Set 65 (1969). (Emphasis in original.)

"* * * No single or exact rule of thumb for providing time, on a non-discriminatory basis, can be stated for application to all situations which may arise in the operation of all stations. The Commission, however, is of the opinion that the operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues and that only charitable organizations and certain commercial interests may solicit memberships is inconsistent with the concept of public interest * * *. The Commission recognizes that good program balance may not permit the sale or donation of time to all who may seek it for such purposes and that difficult problems calling for careful judgment on the part of station management may be involved in deciding among applicants for time when all cannot be accommodated. However, competent management should be able to meet such problems in the public interest and with fairness to all concerned. The fact that it placed an arduous task on management should not be made a reason for evading the issue by a strict rule against the sale of time for any programs of the type mentioned."

United Broadcasting Co., 10 F.C.C. 515, 517–518 (1945). We agree with those views, and see no reason why the Commission and broadcast licensees should be any less competent in 1971 than they were in 1945. Given a scheme of reasonable regulation, there is no reason why acceptance of editorial advertising should cause any substantial harm or disruption not already involved in the acceptance of other advertising. Therefore, to single out and exclude editorial advertising is to violate the First Amendment of the Constitution.

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VII

On the basis of the foregoing, we reverse the Commission's decision that a flat ban on all editorial advertising is permissible. However, we remand these cases to the Commission for further consideration. On remand, the Commission should develop reasonable regulatory guidelines to deal with editorial advertisements. Petitioners should be allowed to reapply for advertising time; and, unless their presentations are found to be excludable under the Commission's guidelines, their applications should be accepted. Since the issues on which BEM and DNC seek to speak are current and changing, it is essential that regulations be developed speedily and that the affected broadcasters pass promptly upon petitioners' applications to buy time.

In the end, it may unsettle some of us to see an antiwar message or a political party message in the accustomed place of a soap or beer commercial. But we must not equate what is habitual with what is right—or what is constitutional. A society already so saturated with commercialism can well afford another outlet for speech on public issues. All that we may lose is some of our apathy. That is a small price to pay. For, as the Supreme Court has said, "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello* v. *Chicago,* 337 U.S. 1, 4 (1949).

Reversed and remanded.

McGOWAN, *Circuit Judge, dissenting:* The majority do not hold that petitioner in No. 24,492 is entitled to have its proposed spot announcements carried by

the intervenor-licensee there involved, or that the petitioner in No. 24,537 is assured of being able to buy time for its programs on public issues. What is held is that the Constitution commands that "*some*", but not all, editorial advertising be accepted; and the Commission is directed to embark upon rulemaking to determine how a licensee is to differentiate the "*some*" from the all.

The majority appear to believe that this assignment will not prove difficult. I am not so sure, particularly when I note that the only Commissioner who has perceived the same constitutional requirement as the majority responds to the practical problems by suggesting that sales of a significant proportion of the total broadcast time be made on a first-come, first-served basis, accompanied by a possible suspension of the fairness doctrine. That approach does not seem to me a promising one in terms of the public's right to know.

The difficulties derive, of course, from the physical peculiarity which distinguishes radio and television communication from all other forms, namely, the limited number of frequencies and the impossibility of accommodating all who may wish to be heard over them. This, so the Supreme Court has said in *Red Lion,* makes it "idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of each individual to speak, write or publish." The majority, in recognition of this fact, do not purport to discern other than an "abridgeable" or "limited" First Amendment right to initiate paid editorial advertising. Petitioners themselves, it is said, may conceivably never be able to insist that their particular advertising be accepted. That will depend upon the rules which the Commission propounds.

The Commission has, at the least, been set a task of heroic proportions, and one whose very complexities

may undermine the premise upon which it is founded. The question is whether the Constitution requires that it be undertaken. I am not convinced that it does. It is presently the obligation of a licensee to advance the public's right to know by devoting a substantial amount of time to the presentation of controversial views on issues of public importance, striking a balance which is always subject to redress by reference to the fairness doctrine. Failure to do so puts continuation of the license at risk—a sanction of tremendous potency, and one which the Commission is under increasing pressure to employ.

This is the system which Congress has, wisely or not, provided as the alternative to public ownership and operation of radio and television communications facilities. This approach has never been thought to be other than within the permissible limits of constitutional choice. Its existence provides a mechanism for implementation of the public's right to know which, by and large, has been effective. Indeed, the loudest voices in criticism of it complain that it has been working too well for the comfort of governmental policy makers in the areas of greatest current concern.

It is hardly the path of wisdom to scrap it for a system in which money alone determines what issues are to be aired, and in what format, even assuming as is likely to be the case, that those issues, whatever they may prove to be, compare favorably with the intellectual content of the great bulk of commercial advertising. The responsibility for informing the public is now squarely on the licensee. That responsibility will only be diluted and obscured by requiring the licensee, against his own better judgment, to accept paid editorial advertising. I do not think the First Amendment requires that result, at least not within the

context of a regulatory scheme which has made provision for the airing of controversial issues of public importance.

Of course it is true that licensees are currently free to accept paid editorial advertising, and some do, subject always to the limitations of the fairness doctrine. It may well be that a detailed inquiry and investigation by the Commission of this area, by formal rulemaking or otherwise, would be both useful and consonant with the Commission's continuing obligation to see to it that the public interest obligations of the licensees are being met in the most effective way. The Commission's currently announced purpose to undertake a comprehensive and wide-ranging review of the operation of the fairness doctrine might well include the subject of paid editorial advertising. But, believing as I do that the First Amendment exerts no compulsion to the contrary, I would not order the Commission to undertake that review in a constitutional straitjacket which dictates the result in advance.

APPENDIX B

[Federal Communications Commission Reports]

F.C.C. 70–861

Before the Federal Communications Commission,
Washington, D.C. 20554

IN RE DEMOCRATIC NATIONAL COMMITTEE,
WASHINGTON, D.C.

Request for Declaratory Ruling Concerning Access to Time on Broadcast Stations

MEMORANDUM OPINION AND ORDER

(Adopted August 5, 1970; Released August 12, 1970)

BY THE COMMISSION: COMMISSIONER COX CONCURRING AND ISSUING A STATEMENT; COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT

BACKGROUND—REQUEST AND PLEADINGS

1. On May 19, 1970, the Democratic National Committee (DNC) filed with the Commission a request that the Commission issue a declaratory ruling that "A broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues." [1]

[1] Comments with respect thereto were filed by the American Broadcasting Company (ABC) on June 11, 1970 and by the Columbia Broadcasting System (CBS) on June 22, 1970 and a statement by the National Broadcasting Company (NBC) was filed on June 22, 1970.

2. DNC seeks a declaratory ruling on these matters because of its desire to purchase time on individual broadcast stations and networks for the purpose of presenting programs and spot announcements of varying duration, some of which would be devoted to the solicitation of funds while others may contain comment on various controversial issues of public importance. The campaign envisioned will, according to DNC, require the expenditure of "thousands of dollars" and thus it seeks assurance that it will be able "to obtain the access to the broadcast media which implementation of the plan demands." It appears that in the latter part of March, 1970, CBS rejected a request by DNC to purchase one-half hour of prime time for the presentation of an issue-oriented program which would have included an appeal for contributions to the Democratic Party. It is said that CBS' position at that time was that it would sell time for political purposes only during election campaigns. DNC also approached NBC and was told that that network would make available prime time for purchase by the Committee for a program presenting the views of the party on important public issues and including a solicitation of funds for the party. It is not clear that DNC approached the ABC network in view of the latter's alleged general policy against solicitation of funds other than for charity and with network approval. By reason of the foregoing and the alleged common policy of individual broadcast stations to decline to sell time for spot announcements or programs for the broadcast of views on controversial issues of public importance or for the solicitation of funds, DNC states that its problem—access to broadcast licenses for the presentation of its programs—can be resolved only through the issuance of the

blanket declaratory ruling described in paragraph 1, *supra.*

3. We believe that the policy matters raised by DNC are, to a substantial extent, appropriate for consideration and that a full statement of our views will provide helpful general guidance for the public and Commission licensees. We, however, do not believe that all of the various matters raised by DNC are susceptible to the declaratory order sought and we cannot at this juncture rule upon every conceivable factual situation which may arise.

4. In support of its request, DNC has set forth some pertinent financial considerations of present-day political campaigning and the development of a narrow rather than a broad-based financial support of political parties.[2] DNC contends that access to mass media, particularly radio and television, is necessary to attract the attention and seek the support of potential small political contributors. It is only in this way, DNC contends, that a healthy political system can function. DNC urges that its proposed broadcast campaign should not be precluded by a variety of differing station and network policies and that the question of access to broadcast media for responsible groups should be subject to a uniform national policy. The

[2] For example, in 1968, $90 million was expended on political use of radio and television (equaling about ⅓ of the total expenditure on political campaigning for the year). See Alexander and Myers, *A Financial Landslide for the GOP*, Fortune, March 1970, pp. 104, 189. Another indicative statistic is the fact that in 1956, only 40% of the contributions to the Democratic Party exceeded $500 whereas the figure had increased to almost 80% in 1968. According to DNC the narrowing of the political contribution base can result in a dangerous concentration of the sources of revenue in special interest groups which, in turn, threatens the entire democratic process.

arguments advanced by DNC are based upon constitutional, statutory and public policy ground.

5. The constitutional argument advanced by DNC is essentially that the Supreme Court's decision in *Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, 395 U.S. 367 (1969) reaffirmed the public's First Amendment right to hear contrasting views on issues of public importance and "employed language that would extend to members of the public the right of access to broadcast facilities." DNC argues that the network policies of ABC and CBS represent arbitrary barriers to broadcast facilities contrary to the law as expressed in *Red Lion, supra.* DNC suggests that under the *Red Lion* standard reasonable restrictions by broadcasters are permissible—e.g., limitation of use of broadcast facilities to responsible spokesmen and protection against use of facilities for libelous presentations or those in bad "taste."

6. According to petitioner, the overriding public policy consideration requiring the declaratory ruling is that the public airwaves—the most powerful communications medium in our society—which are used to solicit funds for "soaps, brassieres, deodorants and mouthwashes" should be utilized to solicit funds to enhance the exchange of ideas. DNC contends that regardless of whether the Commission issues the declaratory ruling requested, the refusal of a broadcaster to sell time to DNC should be evaluated adversely to such broadcaster at time of renewal. The reason for this, DNC urges, is the importance of the broadcast media to political expression (*Farmers Ed. and Coop Union* v. *WDAY,* 360 U.S. 525, 529–30 (1959)); the public interest consideration inherent in broadcasters making time available for political broadcasts (*Report and Statement of Policy Re: Commission En Banc Programming Inquiry,* 20 RR 1901 (1960));

the Commission's prior holding that an arbitrary limitation of coverage of an election campaign prior to the campaign was contrary to the public interest (Citing *Homer R. Rainey,* 3 RR 737 (1947); *City of Jacksonville,* 12 RR 113, 180j (1959); and *Loyola University,* 12 RR 1017, 1099 (1956)) and that the Commission's ruling in *Women's Strike for Peace* (letter of November 22, 1965) predates *Red Lion* and, to the extent it conflicts with that decision, is no longer controlling. Finally, DNC notes that it is seeking not a ruling which would require a broadcaster to accept particular programs or announcements, but only that broadcasters may not establish arbitrary barriers to access by responsible groups, such as DNC, contrary to the First Amendment and *Red Lion, supra,* or that the establishment of such barriers is contrary to the public interest.

7. *Response of the Networks:* In response to the DNC request, American Broadcasting Companies, Inc. (ABC) submitted portions of its "standards and policies" (The complete version has been filed in BAL–5733, Exhibit I–B, Attachment B, Section III). ABC recites its standards relating to solicitation connected with appeals for charity (no solicitation without specific permission of ABC) and appeals related to religious broadcasts (solicitation permitted in prescribed manner not here relevant), but states that its policy is not to sell time for solicitation of funds in other situations, absent special public interest considerations. It is ABC's judgment that DNC's request is concerned with "the continued strength and viability of our two party system" and is thus a "special public interest consideration" justifying an exception to its normal policy of not selling time for solicitation purposes.

8. ABC states that with respect to controversial issues of public importance, there are "dozens" of "responsible entities" who would wish to purchase time to present their views "were we to open the door." ABC contends that it would be "reasonable to anticipate a flood of such requests." Thus, ABC states, it will adhere to its general policy against the sale of time for controversial issue programs and announcements. However, ABC under its "special public interest consideration" standard would ". . . be prepared, consistent with its other obligations, to accept such orders for time from major political parties as can be accommodated on a reasonable basis."

a. CBS' lengthy response to the DNC complaint advances three major arguments: (1) that DNC has misunderstood CBS' policies relating to presentation of controversial issues and that CBS' policies insure full and fair presentation of such issues; (2) that a regulatory policy which imposes common carrier obligations on broadcasters would be contrary to the public interest; (3) that there is no constitutional or statutory right to compel broadcasters to carry the DNC programs; and, (4) that such obligation would be contrary to the Communications Act and Commission precedent.

9. With respect to the first major argument, CBS argues that DNC has not alleged violation of the fairness doctrine but rather seeks to take presentations of controversial issues away from the control and supervision of the licensee. CBS states that if licensees were required to permit the purchase of air time for the presentation of views on controversial public issues, the nature of broadcasting would be radically altered to the detriment of fair, objective and balanced information available to the listening

public.[3] CBS has followed a policy of refusing the sale of broadcast time for presentations of controversial issues in favor of providing "significant opportunities" for such discussions without charge to proponents of various viewpoints through news and information broadcasts. To sell time for presentations on public issues, argues CBS, would result in the preemption of the limited broadcast frequencies by those with strong financial resources which would "necessarily distort the manner in which issues were presented" to the public. CBS asserts that under its present policies, it provides a "high proportion of direct presentations of views" by "the actors in the events of the day" and thus, aside from fully informing the public of differing viewpoints on controversial issues, also provides an opportunity for those holding differing viewpoints to present their own views. These direct presentations, CBS notes, are part of its overall effort to inform the public fully and fairly and are not permitted to become an instrument of "partisan advocacy." The First Amendment, CBS argues, is primarily concerned with the right of the public to be informed—as opposed to the right of the public to speak or to be heard.

[3] CBS asserts that it has served the public by presenting issues and viewpoints within a balanced program schedule utilizing newsworthiness as the sole criterion. CBS emphasizes the growth of public affairs and news presentations during 1968–69 v. 1956–57—e.g., total hours of news and public affairs broadcasting—1,354 v. 675; prime presentations—192 v. 34; regularly scheduled hard news 6:00 p.m.,—11:00 p.m., 338 v. 130; and total hours of news documentaries 100 v. 37. In addition, CBS also presents a comprehensive exhibit to demonstrate the coverage given one of the major issues of the day by CBS and WCBS–TV—the Indochina War and domestic reaction to it. This Indochina exhibit includes a minute and second analysis of CBS' total coverage of this issue and runs over 100 pages.

10. CBS' policy against sale of time for the presentation of views on controversial issues does not apply to broadcasts on behalf of political candidates or ballot propositions. This exclusion is based upon CBS' belief that the intent of Section 315 is to facilitate the discussion of political issues by legally qualified candidates; such political broadcasts may include a direct appeal for funds so long as CBS is not involved in the collection or handling of such funds. CBS also states its intention to permit the purchase of a special category of spot announcement (up to one minute in length) for the purpose of political fund raising which need not be on behalf of political candidates or ballot propositions.

11. With respect to the common carrier argument, CBS states that such a policy would be contrary to the public interest because partisan presentations would diminish the time available for other news, sports and entertainment programs and would result in an "auction" to the highest bidder to determine what issues will be discussed and how such discussion will be conducted. Moreover, CBS queries, would the broadcaster then be responsible for restoring the balance? How would a network choose among competing bidders if not enough time were available for all? What standard is to be used to determine "responsible entities?" CBS argues that DNC's proposal would divest the licensee of responsibility for controversial issue programming and would ultimately require the Commission to make judgments as to the specific programs which are presented or rejected.

12. The legal arguments which CBS advances—i.e., that DNC's request is without constitutional or statutory basis, that Commission compulsion to carry DNC's programs is barred by the Communications Act, and that the action which DNC requests of the

Commission is contrary to the Commission's own policy and precedent—are based primarily upon the assertion that no particular person or group has the right to speak over broadcast facilities and that to assert such a right would ultimately require the Commission to assume the role of a censor or arbitor of specific programs, contrary to its long-established policy of avoiding such governmental involvement. CBS asserts that the *McIntire* case[4] stands for the proposition that "broadcasters, though licensed by the Commission and subject to its valid regulations, are not publicly owned facilities, and there is no First Amendment right to purchase time on radio or television stations." CBS further asserts that nothing in *Red Lion*[5] indicates that *McIntire* is no longer good law or that, apart from Section 315, there is any legal obligation for broadcast licensees to sell time. Rather CBS says, *Red Lion* merely sustained long-standing Commission policies which are wholly in consistent with DNC's request.

13. To accede to DNC's request, CBS argues, would violate Sections 3(h) and 326 of the Communications Act, which taken together establish that the licensee—not the Commission—is to exercise the power of program selection. The right of *personal* reply to material previously selected for broadcast is limited to equal opportunity for political candidates, replies to personal attacks and replies to station political endorsements. CBS contends that the legislative history of the Communications Act supports its assertion that the statutory scheme envisions a system in which the

[4] *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F. 2d 597 (3rd Cir 1945) *cert. den.* 327 U.S. 779 (1946).

[5] *Red Lion Broadcasting Co., Inc.*, v. *F.C.C.*, 395 U.S. 367 (1969).

broadcaster is left with the initiative of assuring that programs presented are in the public interest.

14. Finally, CBS asserts, DNC's request is "fundamentally inconsistent" with the concept of licensee responsibilities and specifically, contrary to the Commission's prior holdings that "the Commission has no power to require a broadcaster to carry or refrain from carrying any particular program, or to prescribe the content of any program presented over the air." Letter to *Women's Strike for Peace,* November 22, 1965.[6] Nothing in the *Red Lion* decision, *supra,* states CBS, indicates that the Court contemplated the abandonment of "traditional FCC fairness policies" and the adoption by the FCC of a common carrier theory as set forth in the DNC request.

15. NBC has no policy which would prevent the purchase of program time envisioned by DNC or the solicitation of funds for the party during such a program. DNC states that it is not clear whether NBC would permit short spot announcements designed for the solicitation of funds for a party, but this simply points up the desirability of a concrete factual situation—namely, of DNC making a specific request, instead of the general, more vague approach which it has taken here.

DISCUSSION

Part I. The right of responsible entities to purchase time for comment on public issues

16. The DNC petition raises two separate questions: (i) the asserted right of political parties to purchase

[6] To support this proposition, CBS also cites *McIntire* v. *Wm. Penn Broadcasting Co., supra;* 1949 *Editorializing Report,* 13 FCC 1246; 1960 *Report and Statement of Policy in the En Banc Programming Inquiry,* 25 Fed. Reg. 7291 (August 3, 1960); and letter to *Judy Collins,* March 24, 1970.

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broadcast time to solicit funds, and (ii) the asserted right of responsible entities to purchase time for comment on public issues. In this Part I, we deal with the second question.

17. That question goes to the heart of the system of broadcasting which has developed in this country—i.e., the licensing of private entities under the public interest standard. While the issues raised by the DNC petition are fundamental, they are not open. They have long been settled adversely to the DNC position, by the statute, by the Commission, and by the Courts. We shall discuss the present system and its statutory support, the relevant precedents, and the policy considerations.

18. The system which Congress has evolved has been described in full in the landmark decisions in this field—*NBC* v. *U.S.*, 319 U.S. 190 (1943), and *Red Lion Broadcasting Co. Inc.* v. *F.C.C.*, 395 U.S. 367 (1969). We shall not repeat that discussion here. It is sufficient to note that it is based upon the unique nature of radio—that "unlike other modes of expression, radio inherently is not available to all. Because it cannot be used by all, some who wish to use it must be denied." (*NBC* v. *U.S., supra,* at 226.)[7] To resolve the chaotic situation which had resulted, Congress decreed a system of licensing private entities for short terms, upon the condition that their operations serve the public interest. It is thus incumbent upon these public trustees to fashion schedules which do meet the needs and interests of the public. To do so, the broad-

[7] The Court recently reaffirmed this vital distinction in *Red Lion* (*supra*, at 388): "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish."

caster must allocate programming among the several categories (e.g., entertainment, instruction, news, public affairs) and, within those categories, must choose among the many competing requests for air time. See *Report on Editorializing,* 13 FCC 1246, 1247–48 (1949). However, there is one special obligation which the Commission has stressed—that broadcasters must ". . . devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station" (*id.* at p. 1249). Indeed, the Commission has stressed that it has allocated so much spectrum space to broadcasting, basically because of the great contribution which broadcasting can make to an informed public opinion on the vital public issues of the day. *Ibid., Storer Broadcasting Co.,* 11 FCC 2d 678. It follows that the Commission can and must require the achievement of that allocation purpose by its broadcast licensees. See Section 303(b); *Red Lion Broadcasting Co. Inc.* v. *F.C.C., supra* at p. 394. In short, as stated by the Court in *Red Lion, supra,* at p. 394, the licensee is ". . . given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern."

19. The Commission has consistently made clear that with some exceptions not here pertinent, the licensee has discretion in discharging that obligation. Thus, in its basic *Editorializing Report,* the Commission stated:

> It should be recognized that there can be no one all-embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of

> presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. . . .

This same policy is set out in the Commission's 1964 *Fairness Primer*, 29 Fed. Reg. 10415, 10416; cf. also 1960 *Programming Statement*, 25 Fed. Reg. 7291 (1960). In line with these general precepts, we have consistently held, in case after case, that with certain exceptions not here involved, no individual has a right to express his particular views by means of a broadcast facility.[8]

20. While the licensee thus has considerable discretion in discharging "the twofold duty" stated in *Red Lion, supra,* at 377—to devote a reasonable amount of time to public issues and to do so fairly—that discretion must be exercised consistent with the public interest standard. The most basic consideration in this respect is that the licensee cannot rule off the air coverage of important issues or views be-

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[8] *Dowie A. Crittenden*, 18 FCC 2d 499 (1969); *Mrs. Margaret Z. Scherbina*, 21 FCC 2d 141 (1969); *Democratic State Central Committee of California*, 19 FCC 2d 833 (1968); *Boalt Hall Student Association*, 20 FCC 2d 612 (1969); *Mrs. Madalyn Murray*, 40 FCC 647 (1965).

cause of his private ends or beliefs. As a public trustee, he must present representative community views and voices on controversial issues which are of importance to his listeners (*Red Lion, supra,* at 389, 390, 394). This means also that some of the voices must be partisan. A licensee policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner would run counter to the "profound national commitment that debate on public issues should be uninhibited, robust, and wide-open." *New York Lines Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964); see also *Red Lion Broadcasting Co. Inc.* v. *F.C.C.,* 395 U.S. 367, 392 (n. 18) (1969); *Storer Broadcasting Co.,* 11 FCC 2d 678 (1968); *Anti-Defamation League of B'nai B'rith,* 9 FCC 2d 190, 191 (1966), affirmed *Anti-Defamation League* v. *F.C.C.,* 403 F. 2d 169, 170 (1968) (C.A.D.C.), *cert. den.* 394 U.S. 930 (1969). In sum, as stressed in the *Editorializing Report, supra,* at p. 1249:

> It is this right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

See *Red Lion Broadcasting Co. Inc.* v. *F.C.C., supra,* at p. 390:

> It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here.

21. With this as background, we turn to the DNC petition. That petition seeks to overrule the above policy and to require licensees to sell time to any responsible entity to comment on a public issue. Using

the CBS response as an example, we note that it would require a holding that CBS' policy in this area is inconsistent with the public interest, because although it recognizes its obligation to devote a reasonable amount of time to controversial issues of public importance (and has submitted a showing of its increasing efforts in this respect, including during prime time hours), and to do so fairly by providing ". . . significant opportunities for such [broadcast] discussion without charge to partisans of various viewpoints in [its] news and information broadcasts" (p. 3, CBS Response), CBS will not sell time for the expression of viewpoints on public issues (with the exception of political broadcasts). It is important to bear in mind that DNC has not alleged that CBS or any other licensee has failed to discharge the above-noted obligations of the fairness doctrine. Thus, what is involved in the DNC request is a question whether there is a right of access to broadcast facilities by "responsible entities" over and beyond the fairness doctrine right of the public to be informed.

22. The DNC position—that the licensee, upon request, must sell time to any responsible entity for comment on public issues—runs counter to the statutory language and the legislative history. That history shows that Congress specifically debated and rejected the idea of the licensee being required to act as a common carrier with respect to transmission of comment on public issues. See Sen. Rep. No. 772, 69th Cong., 1st Sess., p. 4; 67 Cong. Rec. 5560–5561, 12501–12504. The Act reflects this. Section 3(h) states that a broadcaster shall not be deemed a common carrier. Section 315(a) sets out the pertinent statutory standard—that the licensee must operate in the public interest and must afford reasonable opportunity for the discussion of conflicting viewpoints on controversial

issues of public importance. This language cannot be squared with the DNC position; had Congress adopted such a posotion, the statutory prescription would have been entirely different (e.g., . . . "including the sale upon request of time to responsible entities for presentation of a viewpoint on controversial issues of public importance"). The legislative history makes clear that the language of Section 315(a) is a "restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934" (H. Rep. No. 1609, 86th Cong., 1st Sess., p. 5 (1958))—that is, as the legislative history shows, the principles set forth in the basic *Editorializing Report*. That this is the statutory scheme is further shown by the consideration of the second sentence of Section 315(a)—that "no obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate." The purpose of this provision is to make clear that the broadcaster is not a common carrier as to political broadcasts—that he may exercise discretion as to the time to be afforded broadcasts by candidates. See *Memorandum of F.C.C.*, Hearings before the House Subcommittee of the Interstate and Foreign Commerce Committee, 88th Cong., 1st Sess. on H.J. Res. 247, pp. 84–90 (1963) (to the effect that while the licensee has discretion, he cannot adopt a policy of not devoting a reasonable amount of time to political broadcasts). It would make no sense to hold that the licensee has discretion whether or not to sell time for the most important controversial issue programming of all—the political broadcast by the candidate (see discussion within as to the preferred position of such programming), but has no such discretion as to other controversial issue programs (e.g., by a candidate's supporters; by partisans of a particular viewpoint on some public issue).

23. The administrative and judicial precedents reflect the statutory scheme. The Commission's pronouncements are long established and consistent. See, e.g., *Report on Editorializing,* 13 F.C.C. 1246, 1249 (1949); 1960 *Programming Statement; Women's Strike for Peace,* November 22, 1965. The court cases are to the same effect, *McIntire* v. *William Penn Broadcasting Co.,* 151 F.2d 597, 600–601 (C.A. 3), *cert. den.,* 327 U.S. 779; *Massachusetts Universalist Convention* v. *Hildreth and Rogis Co.,* 183 F.2d 497, 501 (C.A. 1). DNC argues that these cases are no longer relevant in light of the Court's decision in *Red Lion,* and that that decision establishes the correctness of its position. We do not so read *Red Lion.* The Government's brief pointed up the nature of the licensee's responsibility under the *Editorializing Report, supra,* at pp. 14–17, 31–32, and the Court recognized the report "as the principal summary of [the Commission's] *ratio decidendi* in cases in this area" (p. 1251). The Court at the outset noted "the twofold duty" imposed by the *Editorializing Report* and the manner in which the obligations under the general fairness request differed from those under the personal attack corollary (pp. 371–379).[9] The Court's decision is based, we believe, on this foundation. The thrust of that decision is not that the broad-

[9] Thus, the Court stated: "These personal attack and political editorializing obligations differ from the general fairness requirement that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attached party's side himself or choosing a third party to represent that side. But insofar as there is an obligation of the broadcaster to see that both sides are presented, and insofar as that is an affirmative obligation, the personal attack doctrine and regulations do not differ from preceding fairness doctrine." *Red Lion Broadcasting Co. Inc.* v. *F.C.C.*, 395 U.S. at 378.

cast licensee is a common carrier, required to sell time to all comers on public issues, but rather that he is a public trustee—a proxy—who must present *representative* community views and voices on controversial issues. The Court's decision thus stresses the right of the public to be informed—not the right of the broadcaster or any individual or group to speak over broadcast facilities. The private censorship by broadcasters which the Court rules out is that which would prevent the presentation of representative community views or voices.

24. There are strong policy arguments in support of the Congressional scheme. We have noted that broadcasting is inherently not open to all (paragraph 18, *supra*). That is true equally with respect to the common carrier access approach urged by DNC. The result could well be a return to the chaotic situation of radio's early days. Since the broadcast medium is a limited one, the amount of time to be devoted to public affairs—as against the other needs and interests of listeners—is also limited. This balance between the categories could be drastically skewed by a requirement that the broadcaster must make available time slots for the discussion of a controversial issue. Further, the public's agenda for discussion of public issues would then be set substantively and increasingly by the affluent—by the person or group which ". . . has the financial resources and interest to purchase sustained access to the mass communications media . . ." (*Banzhaf* v. *F.C.C.*, 405 F.2d 1082 (C.A.D.C. 1968), *cert. den.*, 396 U.S. 842). Since the amount of broadcast time for discussion of controversial issues is limited and since the licensee must afford reasonable opportunity for discussion of both sides, the purchase of substantial blocks of time for a campaign by, say, the oil industry to discuss the

issue of the oil depletion allowance would impose the burden to present reasonably the other viewpoint, and in turn would inevitably cut down on the amount of time for discussion of other issues. But we believe that such allocations of limited time are to be made on the basis of the *public* interest—not that of any private group, however powerful or affluent. Further, the public trustee would lose control over the important aspect of the manner in which the public is to be informed. We recognize that in some instances short spot announcements may serve a useful purpose in this area (see *infra,* p. 17). But we have also pointed up the limitations as to many issues of this manner of informing the public. See e.g., Hearings before the Senate Commerce Committee, H.R. 6543 (1969), pp. 142–143; *Voters Time Rept.,* p. 15. A licensee which reasonably made the judgment that an issue was too complex to be discussed in a 30-second commercial—that "hawking" the issue like a soap did not serve the public interest—would find that judgment frustrated by the DNC policy; it would be required to sell the spots and ordered to make time available to opponents on a similar basis. See *Cullman Broadcasting Co.,* 40 FCC 516 (1963); *KING Broadcasting Co.,* 10 FCC 2d 968, 970 (1967).

25. This last point—the application of *Cullman*—merits further discussion. The *Cullman* principle was developed to deal with the situation where the broadcaster has sold time to one side to present its views, has not presented or made plans to present the contrasting viewpoints, and rejects programming which he deems suitable to present those viewpoints, unless the party offering such programming will pay for its presentation. We held that the licensee could not properly insist upon payment in such circumstances. The paramount public interest, we stressed, is the

right of the public to be informed. The licensee has adjudged that an issue is of importance to its area by presenting the first viewpoint; that being so, the public's right to hear the other side cannot turn on whether the licensee received money.[10] This approach perfectly fits the public trustee concept. It does not fit a common carrier approach. For under the latter system, the licensee has to sell the time, no matter the amount, and then finds himself having to afford free time to the proponents of the contrasting viewpoint, again no matter what the effect on his ability to serve the public interest. Further, under a common carrier approach, each side is usually relegated to purchase, with no *"Cullman"* rights. We believe that *Cullman* is a correct and sound doctrine which ties in with the public trustee concept and best serves "the public interest in the larger and more effective use of radio" (Section 303(g)).

26. In connection with the above discussion, we should note that there is of course no Commission policy thwarting sale of time to comment on public issues. Licensees are free to do so, with the caveat that the fairness doctrine, including the *Cullman* aspect, must be observed. The critical issue is whether the licensee, to discharge either of "the twofold duties" noted at the outset—to devote a reasonable amount of time to issues of public importance and to do so fairly—must sell some time to comment on public issues. The foregoing discussion makes clear that the licensee need not do so. If, for example, CBS chooses not to sell time but rather to fulfill its obligation on a sustaining basis in the manner disclosed in paragraph 9, *supra* (e.g., to provide significant

[10] For the different application of *Cullman* to the political broadcast field, see *Letter to Nicholas Zapple*, FCC 70-598 (1970).

free opportunity for partisan presentations), that choice is within its discretion. What is crucial is that the licensee does meet its obligation "to operate in the public interest and afford reasonable opportunity for discussion of conflicting views on issues of public importance." (Section 315(a).)

27. Finally, we point out that the Commission does recognize the importance of fostering "a multitude of voices" in the discussion of public issues. Thus, it sought to promote the growth of FM radio, UHF television, and noncommercial educational broadcasting, and is seeking to promote a new technology which can make a most significant contribution in this respect—cable television. Because of the potentially great number of channels, cable opens up the possibility of common carrier channels, public access channels, etc. See Notices of Proposed Rule Making In Dockets Nos. 18397A and 18874, 23 F.C.C. 2d——, released July 1, 1970. But the policy in the broadcast field is shaped by the inherent characteristics of that field. As we have shown, that policy is based on the right of the electorate to be informed, and is an issue-oriented "right of access," not the right of any individual to access.

28. At the risk of some repetition (see particularly pars. 24, 25), we believe it appropriate to take up the position set forth in the dissent of Commissioner Johnson.[11] We cannot accept the position of the dissent that the course we are taking conflicts with the First Amendment. As we understand it, the dissenting opinion of Commissioner Johnson urges that the operation of a broadcast station is analogous to the

[11] That dissent is addressed also to the Commission's decision in the *BEM* case, F.C.C. 70 ——, issued this day. Our discussion here is of course equally applicable to the *BEM* case, and we so stated in that opinion.

administration of a public facility, such as a park or a municipal bus (whether publicly or privately owned), and that once the facility is appropriately opened for the expression of views on public issues or commercial advertisements, it is a denial of First Amendment rights to reject or censor a proffered announcement constituting constitutionally protected speech by one willing to pay the customary rate, if there is ordinarily a charge. While we need not disagree with the premise that the Commission's regulation of broadcast stations under the Communications Act must meet First Amendment standards, we think that the dissent—because it ignores established First Amendment policy in this area—posits a nonexistent individual right of access to broadcast facilities.

29. First of all, to the extent that the dissenting opinion urges a near-absolute right of any person who has the money to buy time, it would create a common carrier situation which Congress after due deliberation specifically rejected in Section 3(h) of the Communications Act, 47 U.S.C. § 153(h). Apparently recognizing this collision with the statute, the dissent states (page 25) that Congress and the Commission have permitted a form of private censorship which is inconsistent with the First Amendment. We must note in this connection that it is beyond the power of an administrative agency to declare its governing statute to be unconstitutional. *Central Nebraska Pub. P. & I. Dist.* v. *Federal Power Commission,* 160 F. 2d 782, 783 (C.A. 8, 1947). However, if that infirmity did not exist, we would have no constitutional qualms about our present decision.

30. In its assertion of the unconditional (except for suggested reasonable limitations on time, place and

manner)[12] right to buy time, the dissenting opinion takes no account of the basic, constitutionally valid policy of the Communications Act that because radio is "inherently not available to all," *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 226, there is a public duty adhering to the acceptance of a license to give adequate coverage to public issues which reflects opposing viewpoints, if necessary at the broadcaster's own expense. *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367. See also 47 U.S.C. § 315(a). As *Red Lion* makes clear, the licensee is a fiduciary with obligations to present views and voices which are representative of his community. It is through this basic approach that the paramount right and interest of the public to be fully informed is protected. The operator of a public park or transit system has no such obligation; if the analogy offered by the dissent were valid, a broadcaster would be free to present only one side of every public issue so long as he did not reject any one who chose to speak. There would be no obligation to present the other side, let alone the obligation imposed by *Cullman Broadcasting Co.,* 25 R.R. 895 (1963) to put on an opposing view without charge. It is clear, therefore, that the analogy to other types of facilities that carry speech to the public, or furnish a place for speech, is fatally faulty.

31. Furthermore, the dissent fails to be adequately specific in detailing the types of limitation which it would permit as inroads to the general principle of an absolute right of access. Presumably, the licensee would not have to turn over all of its time on a first come, first served basis, for this would mean that the issues discussed and the persons speaking would be

[12] The dissent also mentions quality standards, an exception which is hardly consistent with its argument.

governed entirely by money. But even if the dissent would permit the licensee to specify amounts of time and issues, the suggested system would appear to be unsound. First of all, the individual right upon which the whole dissent is premised would largely disappear. No person would have the right to discuss an issue of his choosing, at the time of his choosing, and for a duration of his choosing. How could the licensee validly determine that a particular speaker could effectively make his argument in 10 minutes, 5 minutes or a 30-second spot? Yet such determinations would be required. We have said that a licensee may reasonably determine that a position on a complex issue should not be peddled like soap in a few seconds. The dissent would presumably upset that ruling—to what purpose? Beyond these questions is the more important difficulty that depriving the licensee of the discretion to choose representative spokesmen on controversial public issues [13] would lead us to a first come, first served platform dominated by financial considerations—the very result the dissent seeks to avoid and something the Supreme Court has already stated to be undesirable in *Red Lion.*

32. In short, we think the present system of regarding licensees as trustees, *McIntire* v. *William Penn Broadcasting Co.,* 151 F. 2d 597 (C.A. 3, 1945), *cert. den.* 327 U.S. 779, with a duty to present constrasting viewpoints through representatives spokesmen, is constitutionally sound and of greater public benefit

[13] There could be a case where the licensee's policy in this area would be arbitrary (e.g., where he covers the issue, and in announcements of a few seconds duration, and then refuses to let others discuss the issue on the basis). No such case is or has been before us. We have ruled on the assertions of DNC and BEM of general entitlement to time to discuss public issues. Our holding is in that context.

than the concept of an individual right of access, which as we have shown has great drawbacks in the broadcast field.

Part II. The right of political parties to purchase broadcast time to solicit funds [14]

33. In view of the positions now taken by the three major networks (the only parties whose policies were singled out by DNC were CBS and ABC), no extended discussion is called for in this Part.

34. NBC has stated that it has no policy against the sale of time to a major national political party, to be used for the solicitation of funds for the party, including during non-campaign periods. CBS initially rejected the DNC request since it occurred outside an election campaign, but has now revised its policy to permit the purchase during any period by a political party of spot announcements (not to exceed one minute in length) designed to solicit funds for the party. ABC set forth its policy that "absent special public interest considerations, ABC will not sell time for comment on controversial issues or for solicitation of funds" (p. 3, ABC of June 10, 1970, to William B. Ray), but then stated:

> The continued strength and viability of our two party system are of vital importance, ABC has emphasized in recent Congressional hearings the importance of a wider base for political contributions—small sums from millions of Americans rather than large contributions from a few.
>
> * * * * *
>
> Because the strength and viability of the

[14] While the DNC petition is couched in terms of selling time to "responsible entities" to solicit funds, the petition before us is that of a political party and our discussion here is confined to purchase of time by such parties for solicitation of funds.

> major political parties are vitally important, ABC would be prepared, consistent with its other obligations, to accept such orders for time from major political parties as can be accommodated on a reasonable basis. At the same time, we proposed to continue our general policy against the sale of time for controversial issue programs and announcements and solicitations for funds, absent special public interest considerations.

ABC then invited the Commission to address itself to its proposed treatment of the case.

35. We concur in that treatment. We note that Congress has singled out the presentation of the political broadcast as a particularly important aspect of the licensee's public interest obligation. See Section 315 (a), *Farmer's Union* v. *WDAY*, 360 U.S. 525 (1958) (citing F.C.C. cases); F.C.C. Memorandum on Second Sentence of Section 315(a), Hearing before Subcommittee of Interstate and Foreign Commerce Committee, 88th Cong., 1st Sess., on H.J. Res. 247, pp. 84–90. It also requires no discussion to establish that political parties are an integral part of our democratic process and that it serves the public interest to promote the widest possible support by citizens of the party of their choice. See *Voters Time Rept.,* The Twentieth Century Fund (1969), pp. 45–47.

36. In a 1963 ruling, *Letter to Lawrence M. C. Smith,* 40 F.C.C. 549, we sought to encourage the presentation of free broadcast time for this purpose stating:

> First, we recognize that the announcements described by you constitute an effort to achieve the worthwhile and commendable goal of broadening the base of political contributions. The importance of this effort was recently emphasized when, on May 29, 1962, President Kennedy transmitted to the President of the

Senate and the Speaker of the House of Representatives legislation designed to carry out five of the important recommendations contained in the "Report on the President's Commission on Campaign Costs." In his letter of transmittal, the President stated, among other things:

"In these days when the public interest demands basic decision so essential to our security and survival, public policy should enable presidential candidates to free themselves of dependence on large contributions of those with special interest. Accordingly, it is essential to broaden the base of financial support for candidates and parties. To accomplish this, improvement of public understanding of campaign finance, coupled with a system of incentives for solicitation and giving, is necessary."

Furthermore, your proposal has an objective, in common with the broad policy underlying the "fairness doctrine"—the right of the public in a free society to be fully informed as to controversial issues of public importance, including those involving political parties and candidates. See paragraph 6 of enclosed *Editorializing Report.*

Second, the question whether to present such announcements is one for the licensee, who is faced with many competing requests to allocate time for public service announcements. The Commission of course expresses no opinion as to how that time should be allocated. But the announcements in question should not be rejected upon the sole ground that the licensee would have to be fair in their presentation. *Lawrence M. C. Smith,* 25 Pike and Fischer Radio Reg. 291, at 293 (1963).

37. Whether such time is afforded on a free basis is a matter for the judgment of the licensee. The issue here is whether the licensee may adopt or follow arbitrary policies with respect to the sale of broad-

cast time to significant political parties for the solicitation of funds. Thus, the prior CBS policy of confining such sales of time to election periods would appear arbitrary, since the need for the widest possible financial support for political parties is not confined to such periods; and indeed we note that CBS offered no reason for such a distinction.

38. In this connection, we note that affording time for such solicitations does not raise any offsetting considerations, because of the combined force of a number of factors:

(i) This area can be appropriately singled out, since Congress has singled it out for special attention by broadcast licensees;

(ii) This would appear particularly to be an area where the relatively short announcement, limited very largely to fund solications, is both effective and appropriate.[15]

(iii) There is no problem under *Cullman.* For, in this regard the principles set forth in *Letter to Nicholas Zapple,* FCC 70-598 (1970), would govern.

CONCLUSION

39. In view of the foregoing, the request of the DNC and ABC for a declaratory ruling IS GRANTED to the extent reflected in Part II and in all other respects IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

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[15] Of course, the licensee may exercise judgment as to how to present these solicitations for funds, and can afford more extensive programming time, if he so chooses. Indeed, we stress again the considerable discretion of the licensee, consistent with the obligations of the fairness doctrine, as to the various facets such as number, placement, length, etc. *Cf. Lawrence M. C. Smith,* 40 FCC 549.

452-787—71——7

Concurring Statement of Commissioner Kenneth A. Cox

I concur. The essence of the holding as to sale of time for the discussion of controversial issues—as of the *Red Lion* and *Cullman* cases—is that a broadcaster *must* devote substantial time to the presentation of news and public affairs programming dealing with the principal issues of his area. He can sell time for this purpose—subject to *Cullman*—but we will not require him to do so against his wishes. Or he can—and this is generally to be preferred—give time for both sides. I *assume* here that the networks have given, or will give, adequate time for discussion of the key partisan political issues of our time. If not, then we must hold them to that obligation.

I therefore concur generally in this action, except for the matter contained in Paragraph 27.

Dissenting Opinion of Commissioner Nicholas Johnson

[an opening parable]

[Once upon a time there was a nation as great in ideals as industrialization. It had business everywhere—and unsurpassed military might to protect it. And yet its greatest strength was its foundation. For this nation professed to be governed by the consent of its citizens. To insure the successful functioning of this unusual government, free education, libraries, and full information were provided in order that its 200 million governors, through wide-open debate, might govern wisely. As the years slipped by the people spent more and more time in their air conditioned homes watching television, and less and less time listening to speakers in the public parks and reading handbills on the streets. And yet the great

issues, and the need for informed governors, continued. And thus it was that the great debate about the great debate began.]

[Everyone had his own theory how to get the democratic dialogue back to the people (who were all home watching their television sets). Some advocated letters, petitions, press conferences, and picketing, but they didn't seem to be successful. Attention shifted to those who advocated bombing, burning, shooting and looting, because before and after the showing of such activities it was usually possible to present a short message on television (however distorted) about the merits of the issue at hand. Then a third group came along. It said, "Let us simply go to the broadcasters peacefully, and ask them for the time to present our concerns—and even pay them." They were jeered by the crowd, but not deterred. The broadcasters politely explained that there was no longer any room at their inn for the discussion of public issues—like war, and life, and politics—because the time all had to be used for programs and announcements necessary to the very difficult but essential task of manipulating consumers to buy useless and harmful products. And yet these patient and patriotic students, businessmen, and Senators still did not give up. They continued to preach the doctrine of "working within the system." "The government," they said, "will treat us fairly. There is reason and justice in our land. Surely a democratic people need not be violent to be heard." And so it was that they came to the FCC. . . .]

The Democratic National Committee (DNC) has asked the Commission for a declaratory ruling requiring broadcasters to supply two types of "access" to their radio and television facilities: first, the right to purchase, at current commercial rates, short "spot an-

nouncements" to solicit funds for political purposes; second, the right to purchase longer segments of airtime for presentation of political programming on important national issues. The majority, so far as I can determine, has equivocated on the first request, and denied the second. I dissent.

I

We should start with a few fundamentals. The great concept of our Constitution, embodied in the First Amendment, was that our democratic government would endure only so long as its citizens and their elected representatives had the leisure to think, the right to speak, and the freedom to criticize their government. As Supreme Court Justices Holmes and Brandeis understood, "the best test of truth is the power of the thought to get itself accepted in the competition of the market," and that in a government of free men, "the deliberative forces should prevail over the arbitrary." See *Abrams* v. *United States,* 250 U.S. 616 (1919) (Holmes, J., dissenting); *Whitney* v. *California,* 274 U.S. 357 (1927) (Brandeis, J., concurring).

The issues we grapple with today, therefore, pose a crucial question. How can we create a free and open "marketplace of ideas" over the radio and television medium in which citizens, and their elected representatives, can discuss the great issues that weigh upon our nation?

The second fundamental is equally important. For speech to be free, there must be both a *forum* for communication—whether it be a public park, school, town hall meeting, soap box, leaflet, newspaper, magazine, or radio or television frequency—as well as *procedural rules* to keep order, to make it possible for all (or most) to speak in turn, and be heard, in that forum. Perhaps the greatest legal distinction to be

drawn in political and free speech theory is that between restrictions on the *content* of speech (which the First Amendment flatly prohibits), and regulations for the manner of speech (which the First Amendment not only permits but requires). As this nation's concept of speech derives principally from the model of the town meeting, I quote Professor Alexander Meiklejohn, one of the greatest champions of First Amendment freedoms, as he describes the town meeting:

> In the town meeting the people of a community assemble to discuss and to act upon matters of public interest—roads, schools, poor houses, health, external defense, and the like. . . . The basic principle is that the freedom of speech shall be unabridged. And yet the meeting cannot even be opened unless, by common consent, speech is abridged. A chairman or moderator is, or has been, chosen. He "calls the meeting to order." And the hush which follows that call is a clear indication that restrictions upon speech have been set up. . . . [N]o one shall speak unless "recognized by the chair." Also, debators must confine their remarks to "the question before the house." . . . The town meeting, as it seeks for freedom of public discussion, would be wholly ineffectual unless speech were thus abridged. . . .

Meiklejohn, *The First Amendment Is An Absolute,* 1961 Supreme Court Review 245.

Although the First Amendment would clearly ban governmental censorship of speech content, government must be concerned about the procedural rules that control the public forums for discussion. If someone—a moderator, or radio-television licensee—applies rules that give one speaker, or viewpoint, less time (or none at all) to present a position, then a censorship exists as invidious as outright thought control.

There is little doubt in my mind that for any given forum of speech the First Amendment *demands* rules permitting as many to speak and be heard as possible. And if this Commission does not enact them, then the courts must require them.

The analogy to broadcasting should be clear. Yet, we have permitted a system of broadcasting to develop in this country in which private licensees serve, not only as "moderators" for the electronic forums of communication, but as all the "speakers" as well. As the majority states, our limited frequencies require someone to serve as "public trustees." No one would deny this need for a "trustee" system. But that is not the issue. The issue is whether that "trustee" must control *all* the available time, or whether policy and the First Amendment require him, in a manner consistent with his other duties, to turn over reasonable portions of that time directly to the people.

In many ways, broadcasters have resolved this issue themselves. For *they* have created a system in which immediate access is granted to one, privileged class of applicants: the commercial peddler of goods and services. As the system now operates, any person wishing to sell products—toothpaste or "feminine deodorant spray," for example— has direct, personal and instant access to television. He can present his message, in the form he wishes—not in terms of "issues" (the general benefits of toothpaste or deodorant), but in terms of individual products. He is not forced to rely upon a "trustee" to argue the cause of his product for him under some principle of the fairness doctrine—an occasional mention on the evening news, or a Sunday afternoon talk show. He does it personally and directly.

No, our Rules of Order for radio and television are fantastically skewed. We have an individual right of

access, all right, but only for hucksters of industrial garbage. Anyone wishing to discuss war, peace, mental health, or the suffering of the poor, must seek out a corporate "trustee," appointed by the government, to speak for him. But the corporations that have largely contributed to these social ills can defend their wares directly. With the help of Congress and the FCC, the broadcasting industry in this country has built perhaps the most beautiful, efficient, and effective "marketplace of ideas" ever conceived and executed. The industry finds it most profitable, however, to use that marketplace only for the sale of products—not the robust, wide open debate of a free society. And the FCC finds this in "the public interest"!

II

The majority has addressed the first issue—the right to solicit funds via short announcements—in ambiguous fashion. Stating that the three networks have grudgingly announced their willingness to accept such announcements, the majority responds: "We concur in that treatment." (Par. 30.) But how does this "concurrence" rule on the request before us—namely, that broadcasters be *required* to adopt such policies? The majority hints that a denial of such time to political parties outside normal election periods would appear "arbitrary," but does not explain why, nor detail the consequences of such arbitrariness. Because, however, the majority states that solicitation announcements are "appropriate" in this area, I conclude that they make the networks' recently adopted policies binding on them.

In a companion case to this decision, *Business Executives Move for Vietnam Peace* (*BEM*), FCC 70–860, Aug. 6, 1970, I have stated in detail my position that a broadcaster cannot accept commercial ad-

vertisements, yet reject advertisements which are political in nature. I believe the principles there stated are directly applicable to advertisements soliciting funds for political parties. I will not repeat them here, but merely incorporate them by reference. For reasons detailed in that opinion, I concur in the majority's decision to require licensees to accept advertisements by political parties soliciting funds.

I dissent, however, to the majority's position that broadcasters should not be required to offer time for short announcements to *all* persons for *any* purpose. As I have argued in my *Business Executives* opinion, once a licensee opens his forum to the presentation of commercial views, he cannot then close it in a discriminatory fashion—accepting some commercial views and political solicitations, but rejecting all others. I point out only that the Commission's partial waiver for the DNC to permit it to purchase fundraising spot announcements only increases the arbitrariness and discrimination involved in denials of access to political parties for short announcements on current issues, or announcements by groups or individuals either soliciting funds or stating positions on national problems.

In *Wirta v. Alameda-Contra Costa Transit District,* 434 P. 2d 982 (Cal. 1967), for example, a public transit company sold advertising space in its buses for commercial products, but refused to accept an advertisement by Women for Peace, which simply stated:

> "Mankind must put an end to war, or War will put an end to mankind."—President John F. Kennedy . . .

Stating that the political "advertisement" was clearly protected by the First Amendment, the court flatly ordered the company to accept the advertisements for display.

> [A]dvertising is an acceptable and effective means of communication. A regulation which permits those who offer goods and services for sale . . . access to such forum, while denying it to those who desire to express other ideas and beliefs, protected by the First Amendment, cannot be upheld.

Wirta, supra, at 990. The "vice" of censorship lay in "choosing between classes of ideas," accepting commercial ones and banning all others. Every other court faced with the same issue has followed this position. See, *e.g., Hillside Community Church, Inc., v. City of Tacoma,* 455 P. 2d 350 (Wash. 1969); *Zucker v. Panitz,* 299 F. Supp., 102 (S.D.N.Y. 1969); *Kissinger v. New York City Transit Authority,* 274 F. Supp. 328 (S.D.N.Y. 1967). The application of this arm of the law to broadcasting is relatively new and as yet undeveloped and unapplied. But see *United Broadcasting Co.* (WHKC), 10 F.C.C. 515 (1945). I have attempted to show that these cases clearly apply to broadcasting in my *Business Executive* opinion.

The lesson of these cases is clear. The Government could not, for example, allow persons selling products to speak freely in public parks, but bar those opposing the war or require them to "speak" through an interpreter or "trustee" appointed by the Government. No court in the land would tolerate such blatant discrimination. Yet the majority permits this sort of discrimination to occur every day in our nation's electronic "public parks." Although we do not have the question before us, a broadcaster might not have to open his forum to advertising at all. But once he does, he must open it in an even-handed manner—absent some compelling showing of detriment or disruption to his normal programming services. No such evidence on this issue has been supplied to us.

I believe this Commission (perhaps for a two-year trial period) should require broadcasters to accept, up to recognized limits on numbers of commercials, *all* advertisements, whether commercial or political, from *any* person, for broadcast at rates determined by the licensee, on a first-come, first-served basis. If ghetto residents of our major cities wish to purchase announcements decrying the rat-infested, disease-ridden slums in which they are forced to live, they must be given their say. If the Daughters of the American Revolution wish to announce their support for the Vietnam War, they must be given their say. In short, I would open the broadcast spectrum to short announcements from all comers on a first-come, first-served basis. There will be time later to assess and evaluate—to consider, for example, whether the views of the rich predominate—at least, to a greater extent than they now predominate in mass media advertising. I would not expect any fairness doctrine problems. Few licensees would argue that they were unwilling to accept an advertisement because it might force them to present all views on an issue of controversy and public importance. This obligation is already incumbent upon them. And should the fairness doctrine prove unworkable in this field, it could be suspended for this type of programming.

III

The Commission also denies the DNC the right to purchase, at the going rates, half-hour or full-hour programming to discuss issues of national concern. I disagree. If broadcasters are to permit a General Motors or a Ford Motor Company, in effect, to purchase a full hour of "I Love Lucy" as a vehicle upon which to display their commercials, then I do not see how, consistent with the principles enunciated in

Wirta and other cases, the broadcasters can refuse to permit the leading representatives of our legislative branch of government to purchase the equivalent hour to display their ideologies and concerns. I would require licensees to accept programming of a political nature, if offered, in an amount up to 5% of their prime time evening schedule on a first-come, first-served basis. Assuming four hours of prime time every evening (from 7:00 p.m. to 11:00 p.m.), and calculating 30 days per month, that would release six hours per month to "pure access" by politicians and citizens groups alike. The individual licensee would, of course, still retain the right to reject programming for inadequate technical and production quality, or violation of federal law (lotteries, obscenity, etc.). But I would assume that programming purchased by the national political parties would, almost per se, meet any pre-established quality standards. Licensee profits would remain at their present high level. And there will be time later to assess this scheme and determine the extent to which fairness doctrine obligations apply. The fairness doctrine could be suspended in this limited area, on the assumption that persons wishing to respond could purchase the necessary reply time. Obviously this 5% figure is only an initial, approximate determination, and obviously any other reasonable percentage determined by the licensee would also be approximate. But the point is that licensees could not reject *all* programming.

The majority essentially raises several objections to such a procedure. First, they argue that this would permit those with "strong financial resources" to preempt time and distort the presentation of issues. And they maintain that the views of the wealthy would dictate the agenda of national debate. I disagree. The short answer is that the wealthy already set the agenda

for national debate, and a partial "access-for-purchase" procedure would only open a closed system to partial dissent. A longer answer, however, is simply that I have more faith in the theoretical "marketplace of ideas" than does the majority. I am not aware that opening the pages of newspapers or magazines, or the wall space of buses, train stations or subway platforms, have resulted in a preponderance of "wealthy" views. And I do know that the "Political advertising" that appears in daily newspapers—urging, for example, citizens to write the President in support or opposition of the Vietnam war—is more stimulating and thought-provoking than those of department stores and food chains. All in all, I do not see any imbalance in that system of "print" access. Why should we expect it in radio and television?

But more importantly the dissemination even of "false" or one-sided political ideas often serves a socially useful purpose. False commercial ideas (such as the notion that modern cars are "safe," or do not pollute the air) are unlikely to generate opposing claims; at best, they merely goad competing manufacturers into more and more extravagant claims. On the other hand, expressions of political opinion in this country usually lead to argument and debate, not silent acquiescence; to vigorous opposition, not passive acceptance. And debate and dissent is always healthy. John Stuart Mill saw this over 100 years ago, and I do not believe the passing century has proven him wrong:

> The peculiar evil of silencing the expression of opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose

> what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

J. S. Mill, *On Liberty,* quoted in *Buckley* v. *Meng,* 230 N.Y.S. 2d 924, 932 (Sup. Ct. 1962). Given a system in which the small citizen and the man of moderate means are totally cut out from a system of communication, therefore, I believe a partial access system might move a small way toward righting the present imbalance.

The majority's second justification for its position is that we have a limited number of frequencies, and that some "trustee" must necessarily exercise control over broadcasting time. Any other system would result in chaos. Again, this begs the question. Merely because a "trustee" or "gatekeeper" must control some of the time, I see no compelling reason why he must control *all* of it. Broadcasters have essentially abdicated this "trustee" authority to commercial advertisers, gobbling up sponsors as rapidly as they approach, and limiting themselves only by the commercial maximums suggested for radio and television. They have also, on occasion, sold entire hours to sponsors such as Xerox or National Geographic to present their own programming. The question before us, therefore, is whether the present system of broadcasting could function with a *partial* system of access, leaving the vast bulk of programming still under the control of the networks and individual licensees. Nothing the majority has said convinces me that this is impossible.

The third reason given by the majority is that Section 3(h) of the 1934 Communications Act prevents licensees from being treated as a "common carrier." There are many defects in this position, some of which I have dealt with in my dissenting opinion in

Business Executives, FCC 70–860, Aug. 6, 1970. Some are as follows.

First, the legislative history of this provision suggests that the drafters of the 1934 Act were concerned only that Title II of the Act, "Common Carriers," and its rather complicated system of regulation, not be imposed on radio. No one would argue that a partial access system would have this result.

Second, Congress wrote into the 1934 Act the concept that broadcast licensees must serve the "public interest, convenience, and necessity." And it goes without saying that the basic principles of the First Amendment are also incorporated implicitly into the Act. We do not have to declare unconstitutional Section 3(h) of the Act to say that broadcasters must treat persons wishing to do business with it equally. We have ruled in our *Letter to Nicholas Zapple,* FCC 70–598 (1970), for example, that even apart from Section 315(a) considerations, there may be only one appropriate person or spokesman that can satisfy the fairness doctrine obligation imposed upon broadcasters in certain situations. Does this violate Section 3(h) of the Act, by taking from the license choice over the person that uses his facilities? Of course not. A limited system of access for purchase is perfectly consistent with Section 3(h) of the Act, the "public interest," and the First Amendment. Indeed, the First Amendment may require such a system or some reasonable facsimile.

Third, a reasonable system of access does not make broadcasters into common carriers. A doctrine preventing broadcasters from rejecting all persons wishing to submit political advertising or other programming does not force licensees to accept everyone. Obviously broadcasters can establish reasonable limitations on the amount of time he will offer other per-

sons. See *United Broadcasting Co.* (WHKC), 10 F.C.C. 515 (1945). The First Amendment does not establish any particular proportion on percentage figure; it does require, however, that broadcasters devote *some* "reasonable" portion of their time to "access" programming.

IV

The matters before us go far beyond freedom of speech. For in the last analysis, we are confronted with one of the most serious challenges to the system of "checks and balances," the separation of the legislative and executive powers of government, that our country has ever faced. If, for example, through some bizarre turn of events the President, but not the Congress, was granted access to the computer, the telephone, the telegraph, the typewriter, the printing press, and the Xerox machine, we would also see a constitutional quandary of the proportions that face us now. The President has immediate, direct and vivid access to all the minds of the prime-time television viewers in America. Can our tri-partite scheme of government survive if the Congress receives substantially less?

Unlike the fairness doctrine, which often imposes a burden on broadcasters due to the importance of the *issue* to the public, principles of pure "access" pay their own way. The broadcasting industry is out-of-pocket nothing. The great mass of news, documentary and entertainment programming will be unaffected. And the forums of the air will be opened to the breeze of dissent, controversy, and thought.

Unlike the fairness doctrine, an "access" system is self-enforcing. No governmental agency is called upon to decide which issues are controversial and of public importance. Issues reach the public immediately,

without the years of delay required to push a fairness doctrine controversy through the Commission and the courts.

And, unlike the present system, the views that reach the people will not be dominated by the consensus committees of the corporate television establishment. There are some who fear that the agenda of debate will be set by the rich. But who, after all, sets that agenda now? The great mass of television programming consists of format entertainment series, carefully designed as supportive and palatable packaging for the commercial content supplied by the merchandisers of our land. To the extent a network seeks to provide programming which is "offensive" to some corporate interest, then pressures for censorship are brought to bear—as Coca Cola is alleged to have pressured NBC over its recent documentary on migrant workers. All we can hope for is a system of access in which at least a small percentage of the time and views will originate directly from the people—of all views, persuasions, and walks of life. That even that modest participation is anathema to the broadcasters is testimony to their dangerous arrogance and unrestrained power. Accordingly, I dissent to today's Commission action.

APPENDIX C

[Federal Communications Commission Reports]

F.C.C. 70-860

Before the Federal Communications Commission,
Washington, D.C. 20554

IN RE COMPLAINT BY BUSINESS EXECUTIVES MOVE FOR VIETNAM PEACE

Concerning Fairness Doctrine Re Station WTOP, Washington, D.C.

AUGUST 5, 1970.

BUSINESS EXECUTIVES MOVE FOR VIETNAM PEACE,
% Asher & Schneiderman,
1320 19th Street NW.,
Washington, D.C.

GENTLEMEN: This is with reference to your complaint dated January 22, 1970, against the licensee of Standard Broadcast Station WTOP, Washington, D.C., and to statements subsequently submitted by you and the licensee.[1]

From information before us it appears that the complainant, Business Executives Move For Vietnam Peace Organization (hereinafter called BEM), a national organization of more than 2700 business owners

[1] Pleadings before the Commission include: Complaint filed by BEM on January 22, 1970; letter of response filed by Post-Newsweek Stations (WTOP) on February 5, 1970; letter of reply filed by BEM on February 16, 1970; letter requesting Commission action filed by BEM on February 24, 1970; letter filed by WTOP on February 24, 1970; letter filed by BEM on February 26, 1970, and response of WTOP filed February 27, 1970; letter filed by WTOP on February 27, 1970; letter filed by BEM on March 10, 1970; letter filed by WTOP on April 3, 1970; and letter filed by BEM on April 15, 1970.

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and executives sought, in June 1969, to purchase time on WTOP for the purpose of broadcasting one-minute announcements urging immediate withdrawal of American forces from Vietnam and from other overseas military installations. While there is some indication that the complainant was informally given a favorable response, WTOP declined to sell time. BEM renewed its request in July, 1969 and again in January, 1970 with the same negative result. The licensee cited its long established policy of refusing to sell spot announcement time to individuals or groups to set forth views on controversial issues and stated that "subjects of this type require a more in-depth analysis than can be provided in a 10, 20, 30 or 60 second announcement.

Complainant's initial request to the station made no reference to the fairness doctrine and after being turned down in its attempts to purchase time, complainant made no further demands upon the licensee in terms of fairness doctrine, i.e. that the station in its coverage of the Vietnam issue present views similar to those expressed in BEM's statements. Complainant now alleges, however, that in refusing to sell or to provide free time for the announcements, the licensee has violated the fairness doctrine, infringed on the public's right to hear contrasting views such as those contained in BEM's announcements, and violated the First Amendment to the Constitution by suppressing free speech. Therefore, complainant contends, the Commission should order the licensee to present its announcements, either free of charge, or, in the alternative, at commercial rates. In response, the licensee denies complainant's charges and asserts that it has complied fully with all relevant statutes and Commission rules and policies. We shall deal first with the fairness aspect of the complaint. Normally, fairness

complaints arise as a result of unsuccessful negotiations between the complainant and the station licensee. The Commission has developed procedures for the filing of a complaint under the fairness doctrine in the following manner:

> * * * The Commission expects a complainant to submit specific information indicating (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station had afforded, or has plans to afford, an opportunity for the presentation of contrasting viewpoint.[5] [2]

In short, by the time a complaint under the fairness doctrine reaches the Commission, the parties (both the complainant and the station) will have had an opportunity to fully crystallize their positions and delineate their areas of agreement and disagreement.

In the case before us, BEM initially made a request to purchase air time for the presentation of a number of spot announcements dealing with United States presence in Vietnam. The same request was made on at least three occasions with the variation that if WTOP would not sell time for this purpose, that it should provide it free of charge. The pleadings before us do not indicate that at any time BEM sought station coverage of views similar to those urged in its spot announcements by WTOP in its program coverage of the Vietnam War.

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[5] The complainant can usually obtain this information by communicating with the station.

[2] *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29, Fed. Reg. 10415, 10416.

Consequently, while we will consider the complaint of BEM in its entirety, we believe the issue would have been immeasurably sharpened if the procedures set forth above had been observed.

BEM states that the Vietnamese war is unquestionably a controversial issue of public importance; that although WTOP has regularly presented the views of government officials and others supporting the Administration's position, it has not devoted a significant amount of time to contrasting views; that the war has provoked a wide diversity of responsible views, rather than merely views on "two sides;" that BEM advocates views in contrast to those already broadcast;[3] and that only by permitting BEM to air its views can WTOP comply with the legislative policy that it "afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[4]

In response, the licensee states that it has tried to provide balanced coverage of the Vietnam war issue in news reports, news interviews, commentary and state-

[3] A review of BEM's announcements reveals that the following views are expressed: (1) that the bloodshed which may result from United States withdrawal from Vietnam does not compare with the bloodshed presently going on in Vietnam; (2) that the United States should not remain in Vietnam, because the war is morally corrupt, politically inept, and militarily stupid; (3) that the war is destroying the United States internally; (4) that the South Vietnamese government does not represent the people; (5) that "Vietnamization" of the war will prolong the war; (6) that the United States should try to save lives by withdrawing and not try to "save face;" (7) that the war is a "national disgrace;" (8) that our withdrawal must be total; (9) that remaining in Vietnam is based on a pseudo-patriotic principle; and (10) that the United States needs to overhaul its entire foreign policy.

[4] 47. U.S.C. § 315.

ments by both supporters and opponents of the Administration policy. It cites extensive coverage of Moratorium activities last fall, including press conferences, meetings and rallies of numerous anti-war groups, and its handling of the President's speech of November 3, 1969, following which it presented five leaders generally supporting the President's position and six leading critics of his policy. It states that it has broadcast the diverse views of its own commentators (Carl Rowan, Drew Pearson, Rod MacLeish and James J. Kilpatrick) and also carries the CBS programs, "Face the Nation" and "Capitol Cloakroom," which it states have provided opportunity for national leaders to present views both for and against the President's policy. WTOP alleges that BEM's complaint lacks the specificity which the Commission requires to establish unfairness, and states that "A complete quantitative evaluation of the coverage of any station, let alone an all-news and information station [WTOP], of as long-continuing an issue as the Vietnam War and President Nixon's policy with respect to that war would be virtually impossible as a practical matter." However, it states that a spot check of the three-month period, April–June 1969, reveals that its news reports and other programs included the views of a variety of Administration critics on the war on numerous occasions. The licensee has submitted an affidavit by the Executive Editor of WTOP Radio, stating that "of my own knowledge . . . each of the viewpoints embodied in the BEM announcements has been expressed on a number of occasions in various types of broadcast over WTOP . . . ."

The fairness doctrine requires a station which presents one side of a controversial issue of public importance to afford reasonable opportunity for the presentation of significant contrasting viewpoints on the issue

in its overall programming, which may include news programs, interviews, discussion, debates, speeches and the like. No particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure, rather than the right of any individual or group to present personal views. As we stated in our *Report In the Matter of Editorializing by Broadcast Licensees,* 13 FCC 1246 (1949):

> In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person (or group) making the request.

In the present case, because of the multiplicity of spokesmen available to express views on the Vietnam war, it is obvious that a licensee must exercise its judgment in choosing appropriate spokesmen to insure an orderly and effective presentation of the many conflicting views. The question, then, is whether a licensee has exercised reasonable, good faith judgment in applying the fairness doctrine to a particular issue or issues.

In the letter to *Mrs. Madalyn Murray,* 40 FCC, 647, 5 RR 2d 268 (1965), we stated:

> A licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation . . . as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all other facets of such programming. In passing on any complaint in

> this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith.

On the basis of BEM's complaint and the licensee's response, we are unable to find that the licensee acted other than reasonably and in good faith in refusing to make time available for the broadcast of BEM's announcements. On the one hand, we have the licensee's assertion that it has presented a wide variety of views on the Vietnamese war, including those embodied in the proposed announcements. The licensee has cited a number of specific instances in which it has presented views opposed to further American participation in the conflict. On the other hand, we have no more than a general allegation that WTOP has failed to present significant contrasting views on the subjects covered in the announcements. As we stated with regard to similar vague allegations in our letter of November 25, 1969, to *Allen C. Phelps and the Federation of Citizens Associations of the District of Columbia,* 21 FCC 2d 12, where it was charged that this same licensee had presented only the "liberal" viewpoint on a number of issues such as racial discrimination:[5]

> Absent detailed and specific evidence of failure to comply with the requirements of the fairness doctrine, it would be unreasonable to require licensees specifically to disprove alle-

[5] The *Phelps* complaint charged that WTOP's violation of the fairness doctrine was manifest by one-sided coverage of issues such as "liberal v. conservative" political philosophy, coverage of the Nixon administration, hostility toward the South, problems of the District of Columbia including crime, race relations, law and order and the station's attitude toward mass demonstrations.

gations such as those made here. The Commission's policy of encouraging robust, wide-open debate on issues of public importance would in practice be defeated if, on the basis of vague and general charges of unfairness, we should impose upon licensees the burden of proving the contrary by producing recordings or transcripts of all news programs, editorials, commentaries and discussion of public issues, many of which are treated over long periods of time. Accordingly, although the Commission intends also to employ other appropriate procedures to insure compliance by licensees with the fairness doctrine (e.g., in-depth spot checks at renewal time), it has long been our policy normally to require that fairness doctrine complaints (a) specify the particular broadcasts in which the controversial issue was presented, (b) state the position advocated in such broadcasts, and (c) set forth reasonable grounds for concluding that the licensee in his overall programming has not attempted to present opposing views on the issue. See *Applicability of Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* 29 Fed. Reg. 10415 (1964).

In short, where, as here, the complainant has made only a general allegation and the licensee has answered by affidavit that it has presented such viewpoints on numerous occasions, pointing also to example coverage of the Vietnam war, it is not unreasonable that the burden be placed on the complainant to come forward with some indication why a more detailed showing should be required—why it is he believes that the licensee has been unfair. Here the complainant has wholly failed to do so. We stress that we are not requiring complainants in this area to prove their case ahead of time. To place any undue burdens on such complainants would be inconsistent with the public interest since the Commission does depend for pur-

poses of enforcement to a large extent on complaints in this area. However, the complainant must have some basis for his complaint that a licensee has been unfair and that basis can and should be set forth (e.g., several days monitoring of news or public affairs programming, with the assertion that only one viewpoint is presented). For, just as an undue burden should not be placed upon complainants, so also it is inappropriate to place such a burden on the licensee. A complainant cannot simply say the word, "Vietnam", "racial discrimination", "pollution", and require a licensee to devote extensive man-hours to cull over his past programming to show fairness on general issues of this nature. This would be particularly burdensome to smaller stations, and would not be a policy promoting "robust, wide-open debate". Cf. *The New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). In sum, as a public trustee, the licensee must shoulder certain burdens, including upon an appropriate complaint the burden of showing that he has complied with the fairness doctrine, but based on our experience we find that the public interest also requires some reasonable specificity in a complaint to trigger this detailed showing by the licensee. There is no such specificity in this case, just as there was none in the *Phelps* case.

Before passing to the next particular of the complaint, we take cognizance of BEM's contention that licensee's policy of refusal to sell time for the broadcast of spot announcements dealing with controversial issues violates the fairness doctrine and amounts to "picking and choosing among topics so as to give exposure only to those which it prefers." It states that WTOP does broadcast announcements "on such controversial subjects of public importance as religion, the environment, the national economy, armed forces

recruiting and smoking," and that it presents brief editorials taking positions on controversial issues. WTOP replies that it does not believe that the public service announcements it carries involve controversial issues of public importance; that it does not broadcast cigarette advertising, and that it believes that the anti-smoking announcements which it carries are in the interest of public health and welfare, comparable to consumer reports "to help protect the public from fraudulent or deceptive business practices." It states that its editorials are two minutes in length and "provide enough time for development of position," whereas, it asserts, "The actual substantive portion of the BEM spots [ranges] from about 20 seconds to 35 seconds . . .".

We find no reason to reverse our prior ruling in *Women's Strike for Peace* that the WTOP policy in question does not *per se* violate the fairness doctrine or any other Commission policy.[6] Citing Section 3(h) of the Communications Act of 1934, as amended,[7] we pointed out in that ruling that a broadcasting station is not a common carrier under the Act and therefore is not required to open its doors to all persons seeking to use the station's facilities for whatever purpose. As we stated in our letter to *Mrs. Madalyn Murray, supra,* it is within the licensee's judgment to determine the format for presentation of controversial issues "and all other facets of such programming." The licensee here has asserted, without rebuttal other than the unsupported assertions of complainant, that it has presented contrasting views, including the viewpoints

[6] Letter to *Washington Women's Strike for Peace*, November 22, 1965.

[7] Section 3(h) of the Act provides, in pertinent part, that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

embodied in complainant's announcements on the recited issues, and we find no reason to require that it present in addition the views of any particular group or in any particular format. We need not develop this point further, in view of the extensive treatment given the legal and policy consideration in the DNC ruling, 1 art I, issued this day, FCC 70– ——. We rely here on those considerations.

In the second part of its complaint, BEM asserts that WTOP has frustrated the public's right to hear the views of BEM and thus has denied "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences. . . ."—citing *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission*, 395 U.S. 367, 390 (1969). However, as we noted above, the licensee has furnished or tendered evidence that it has provided suitable access to the public on the ideas which BEM wishes to express, and it is clear that in this passage the Supreme Court was stressing the essential nature of the fairness doctrine, rather than the right of a particular spokesman to obtain access to the air, except in cases of personal attack and editorials endorsing or opposing political candidates. The Court stated:

> To condition the granting or renewal of licenses on a willingness to present *representative* community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgement of freedom of speech and freedom of press. *Id.* at 394 (emphasis added).

And in distinguishing between the general fairness obligation and the special obligations imposed in the case of a personal attack or a candidate endorsement, the Court noted that,

> These obligations differ from the general fairness requirement that issues be presented and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attacked party's side himself or choosing a third party to present that side. *Id.* at 378.

Inasmuch as WTOP appears to have presented "representative community views" on the issues here in question, we find that it has not acted contrary to the principles laid down in *Red Lion*. See discussion in *DNC* ruling, *supra*.

Finally, BEM argues that the Commission would be violating the First Amendment rights of BEM's spokesmen by sanctioning the licensee's policy of refusing to sell BEM time. Complainant relies principally upon the *Red Lion* decision. We do not believe that the Court's decision supports complainant's conclusion. As noted above, the Communications Act specifically provides that a broadcaster shall not be deemed a common carrier, and thus he may exercise his judgment as to the particular program matter he will present. The licensee is thus constantly called upon to make choices between types and formats of programming and the persons to participate therein. If the licensee were required to present any matter brought to him which was not obscene, etc., the result would be not only chaotic but a wholly different broadcasting system which Congress has not chosen to adopt. *DNC* ruling, *supra*.

Based on the foregoing, we cannot find that the licensee of WTOP acted unreasonably or in bad faith with respect to the fairness doctrine, nor do we believe that its conduct was inconsistent with the principles laid down by the Supreme Court in *Red Lion* or infringed the First Amendment rights of BEM's

spokesmen. Accordingly, the complainant's request for relief is denied.

Commissioner Bartley concurring in the result; Commissioner Cox concurring and issuing a statement; Commissioner Johnson dissenting and issuing a statement.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

Concurring Statement of Commissioner Kenneth A. Cox

I concur in this action because BEM has not made an adequate showing that its members' views have not been reasonably reflected in matter broadcast by WTOP. It is implicit in this ruling, of course, that if the station had not devoted reasonable time to the issues involved in the Vietnam War—including the positions espoused by BEM—it could have been required to do so. But that marks the extent of its obligation to the public in this regard. To require more would pose serious problems for the continued health of our broadcast system and would clearly discourage the full and effective practice of broadcast journalism. The fact that BEM is willing, if need be, to pay for time to broadcast its views does not alter this. In the first place, if stations were required to carry all spots dealing with controversial issues for which time was ordered, this might occupy much of the time which can be devoted to nonprogram matter and could, in time, impair the effectiveness of the broadcast media for advertising purposes. Furthermore, although BEM is willing to pay, our ruling in *Letter to Cullman Broadcasting Co., Inc.,* FCC 63–849, would subject any station carrying its messages to the risk that those holding contrary views might

claim free time for reply. I fully support the *Cullman* doctrine in those cases where broadcasters elect to accept sponsored controversial issue programming or paid spots, but think that to *require* them to accept such matter would unreasonably expose them to erosion of their advertising revenues. I have made it clear that I do not think broadcasters should escalate commercial time or seek to maximize their profits, but our system depends upon profitable commercial operation and I am not prepared to try to change that fundamental fact.

I do not think our ruling should be understood as holding that it would have been contrary to the public interest for WTOP to carry BEM's announcements, as other stations apparently did. While the brevity of the messages makes it impossible for them to develop ideas to any significant degree, I do not think we are in a position to rule that those who oppose the war in Vietnam should be completely barred from using this technique for getting their viewpoints across to the public. But I think their right of access to time on a station which has already adequately treated the war issues and has already reflected a particular claimant's position must depend on that station's willingness to accept such spots, with full understanding of its resulting obligations under the Fairness Doctrine, including the *Cullman* ruling.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

> The peculiar evil of silencing the expression of opinion is that it is robbing the human race; posterity as well as the existing generation; [and] those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of

> exchanging error for truth; if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error * * *
>
> —J. S. Mill, *On Liberty,* quoted in *Buckley v. Meng,* 230 N.Y.S. 2d 924, 932 (Sup. Ct. 1962).

History will record, I believe, the fundamental misstep taken today by the Commission in its slow progress toward securing truly free speech for all citizens over the broadcast media. Almost two hundred years ago, the architects of our country drafted a constitutional scheme of government based on the bedrock of one paramount principle: that a free society would endure only so long as its citizens had the freedom to think, to speak openly, and to criticize their government. This First Amendment freedom of speech and press was "preferred" above all others, see *Marsh* v. *Alabama,* 326 U.S. 501, 506 (1946), *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945), for all other liberties could be defended only so long as speech remained free. But should free speech vanish, then the informed electorate necessary to preserve other freedoms would cease to exist.

Yet freedom of speech does not exist as an abstraction. The First Amendment protects not just the right to speak, but the right to reach an audience—the right to *communicate.* Protection of the means used to disseminate ideas, therefore, as well as the availability of forums used for discussion and debate, must receive as much attention as the more abstract right to speech itself:

> The right of free speech necessarily embodies the *means* used for its dissemination because the right is worthless in the absence of a meaningful method of its expression. To take the position that the right of free speech consists

> merely of the right to be free from censorship of the content rather than any protection of the means used, would, if carried to its logical conclusion, eliminate the right entirely. The right to speak freely must encompass inherently the right to communicate. The right to speak one's views aloud, restricted by the ban that prevented anyone from listening, would frame a hollow right. Rather, *freedom of speech entails communication; it contemplates effective communication.*

Wollam v. City of Palm Springs, 379 P. 2d 481, 486 (Cal. 1963) (emphasis supplied).

The Supreme Court has often recognized this principle, holding that forums for the expression of views must remain free and open, and that the preservation of these forums for the communication of views between citizens is one of our most important goals. In *Hague* v. *CIO,* 307 U.S. 496 (1939), Mr. Justice Roberts made the statement that *Kunz* v. *New York,* 340 U.S. 290, 293 (1951), later elevated to precedent:

> Wherever the title of street and parks may rest, they have immemorially been held in trust for the use of the public, and time out of mind have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague v. *CIO, supra* at 515. The Supreme Court has recognized this right of access to a "public forum" of communication in numerous other areas, including privately owned sidewalks, *Marsh* v. *Alabama,* 326 U.S. 501 (1946), modern shopping centers, *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308 (1968), and public

schools, *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503 (1969). And the Court has also acknowledged the importance of the press, see *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945), and the electronic media, see *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367 (1969), as forums or *means* for the communication of thought.

The question before this Commission, therefore, is the extent to which the First Amendment *requires* that the public forums of broadcasting be equated with the "streets and parks" of *Hague* v. *CIO*, and that the rights of citizens' access to those forums be included among the basic "privileges, immunities, rights and liberties of citizens." We must determine whether private corporate licensees of the FCC have any more right to exclude citizens from the use of their facilities, than a privately owned "company town," see *Marsh* v. *Alabama*, 326 U.S. 501 (1946), has a right to exclude citizens from its streets. The broadcast spectrum is public property belonging to the citizens of this country. It is entrusted for limited periods of time to the trusteeship of private entities, corporate broadcast licensees. I believe these corporate licensees must be treated, for purposes of speech freedoms, as privately owned "company towns."

The issue, therefore, is not what policy the Commission might wish to adopt concerning the "advertisements" before us, but what the Constitution *requires* the Commission to adopt. "In seeking to provide the broadcasting media with the diversity *demanded* by the first amendment, . . . the Commission must avoid the perils of . . . abdication which would allow those possessing the most economic power to dictate what may be heard. . . ." *National Ass'n of Theatre Owners* v. *FCC*, 420 F. 2d 194, 207 (D.C. Cir. 1969)

(emphasis supplied). I believe the Commission has failed in this task.

The facts here are simply stated. Complainant, Business Executives Move for Vietnam Peace (BEM) is a well-established national organization with more than 2,700 members from business communities across the country. BEM has sought, unsuccessfully, for over a year, to purchase airtime on WTOP–AM in Washington, D.C., at its standard commercial rates, to present to residents of the nation's capital (including nationally elected members of the government) one-minute "spot announcements" urging immediate withdrawal of American troops from Vietnam and otherwise opposing the current Administration's war policy. WTOP–AM has denied BEM access to its broadcast facilities—which it freely offers to purveyors of mouthwash, underarm deodorant, and hand soap—on the ground that the station has a long-established policy of refusing to sell spot announcement time to individuals or groups with "controversial" views. WTOP–AM's principal justification for this policy is the belief—apparently not shared by BEM—that "subjects of this type require a more in-depth analysis than can be provided in a 10, 20, 30, or 60 second announcement." The Commission has thrown the weight of its precedents and support behind WTOP–AM's decision to bar the views proffered by BEM. Citing Section 3(h) of the 1934 Communications Act, the Commission argues that licensees are not "common carriers" and therefore WTOP–AM is "not required to open its doors to all persons seeking to use the station's facilities for whatever purposes." The majority thus delegates to "the licensee's judgment" the power to determine "the format for presentation of controversial issues 'and all other facets of such programming.'" Any other result, the Com-

mission contends, "would be not only chaotic but a wholly different broadcasting system which Congress has not chosen to adopt."

The Commission's decision, I believe, ignores a long line of judicial precedent which guarantees to individuals a *right of access* to forums generally open to the public for expression of views. These cases, which I will discuss in detail below, establish the proposition that a private or public corporation, which exercises possession of, or control over, property which is open to the general public or to the communication of particular views, cannot discriminate between the persons or views that seek access to its facility, barring some and admitting others. BEM's request, therefore, places the following four issues before the Commission: *first,* are BEM's anti-war spot advertisements constitutionally protected "speech" under the First Amendment; *second,* is the action of WTOP–AM, a private corporation licensed and supervised by a public agency in a fiduciary or trustee capacity for public property, sufficient "state action" to bring the First Amendment's protections into operation; *third,* are BEM's proposed spot announcements an "appropriate" exercise of speech activities in the public forum of WTOP–AM's frequency, given the character, usual activity and purpose of the forum and the nature of competing uses; and *fourth,* is a limited right of "non-commercial paid access" to WTOP–AM's frequency consistent with Section 3(h) of the Communications Act of 1934, which declares that broadcast licensees shall not be deemed "common carries." I believe the Constitution compels an affirmative answer to all four questions. For the reasons stated below and in my dissenting opinion in Democratic National Committee, FCC 70–861, Aug. 5, 1970, I dissent to the majority's treatment of these issues.

452–787—71——10

I. ADVERTISEMENTS AS PROTECTED "SPEECH"

The Supreme Court has drawn a distinction between two types of speech: the first, political or social speech, is entitled to the fullest constitutional protection. Indeed, Professor Harry Kalven believes the "central meaning of the first amendment" is to preserve the citizen's right to criticize those who govern for him. Kalven, *The New York Times Case: A Note on 'The Central Meaning of the First Amendment,'* 1964 Sup. Ct. Rev. 191, 208–09; see Meiklejohn, *The First Amendment Is An Absolute,* 1961 Sup. Ct. Rev. 245, 256.

The second type of speech, "commercial" speech, however, has not been given much deference. "In the quarter century since *Valentine* v. *Chrestensen* [316 U.S. 52 (1942)], the notion that commercial advertising is not protected by the first amendment has been enshrined among the commonplaces of constitutional law." Note, *Developments in the Law: Deceptive Advertising,* 80 Harv. L. Rev. 1005, 1027 (1967); see, *e.g., Ginzberg* v. *United States,* 383 U.S. 463, 474 n. 17 (1966); *Polak* v. *Public Util. Comm'n.,* 191 F. 2d 450, 456–57 (D.C. Cir. 1951) (dictum), *reversed on other grounds,* 343 U.S. 451 (1952); see also, Note, *Freedom of Expression in a Commercial Context,* 78 Harv. L. Rev. 1191 (1965). In *Valentine* v. *Chrestensen, supra,* the Court upheld a municipal ban on the distribution of commercial pamphlets on city streets. The Court simply observed that "the Constitution imposes no * * * restraint on government as respects purely commercial advertising." *Valentine* v. *Chrestensen,* 316 U.S. at 54.

Although the distinction drawn is an elusive one, it divides, perhaps, speech which seeks to influence political and social decisions in the marketplace of ideas

from speech which seeks to influence private economic decisions in the marketplace of goods and services. Compare *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943) (conviction for door-to-door solicitation of contributions for religious literature reversed), and *Jamison* v. *Texas,* 318 U.S. 413 (1943) (advertisement on back of religious handbill protected), with *Breard* v. *Alexandria,* 341 U.S. 622 (1951) (conviction for door-to-door solicitation of magazine subscriptions upheld). And while this distinction has been severely criticized, see *Cammarano* v. *United States,* 358 U.S. 498, 513–15 (1959) (dictum) (Douglas, J., concurring), and I think with reason, it may indicate that the dissemination of "false" political ideas can evoke discussion or controversy which may refute or highlight the falsity of the original statement. "False" commercial assertions, by contrast, may only breed additional false claims from competitors with no corresponding improvements in the products sold. Note, 80 Harv. L. Rev. 1005, 1030 (1967). Viewed in this light, WTOP–AM and the Commission have relegated political and social speech to a peculiarly inferior role. By permitting broadcasters categorically to exclude political advertisements and accept only commercial announcements, the Commission has encouraged exclusion of highly valued political speech to the benefit of paid commercial speech.

With this in mind, it is clear that the paid anti-war advertisements proffered by BEM fall within the category of protected—indeed highly valued—political speech. The fact that BEM is willing to pay the "admission price" for access to WTOP–AM's facilities does not detract from the purpose of its message to encourage political decisions in the marketplace of ideas. The Supreme Court in *New York Times Co.*

v. *Sullivan*, 376 U.S. 254 (1964), conclusively laid all doubts to rest on this point:

> The publication here was not a "commercial" advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. * * * That * * * the advertisement [was paid for] is as immaterial * * * as is the fact that newspapers and books are sold. [citations] * * * *Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.* [citation] * * * The effect would be to shackle the First Amendment in its attempt to secure "the widest possible dissemination of information from diverse and antagonistic sources." [citation] * * *
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> * * * The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection.

New York Times Co. v. *Sullivan, supra* at 266, 271 (emphasis supplied). "[W]hen an advertisement is the medium for noncommercial expression, constitutional freedoms apply in spite of its commercial nature." Note, *Resolving the Free Speech-Free Press Dichotomy: Access to the Press Through Advertising*, 22 U. Fla. L. Rev. 293, 309 (1969) (citing further authority at n. 131). *Accord, Banzhaf* v. *FCC*, 405

F. 2d 1082, 1101–02 (D.C. Cir. 1968); *Zucker* v. *Panitz*, 299 F. Supp. 102, 104 (S.D.N.Y. 1969); *Wirta* v. *Alameda-Contra Costa Transit Dist.*, 434 P. 2d 982, 984–85 (Cal. 1967).

I conclude, therefore, that BEM's anti-war advertisements are "speech" deserving of First Amendment protection.

II. "STATE ACTION"

The First Amendment provides that "Congress shall make no law * * * abridging the freedom of speech. * * *" Although the language of this amendment binds only the national government, the Supreme Court has extended its protection to actions by the states as well. *Fiske* v. *Kansas*, 274 U.S. 380, 387 (1927); *Gitlow* v. *New York*, 268 U.S. 652, 666 (1925). "Yet, while the Fourteenth Amendment affords protection from state action as well as that from the national government, it does not protect against wrongs done by private persons." *Chicago Joint Bd., Amal. Cloth. Wkrs.* v. *Chicago Tribune Co.*, 307 F. Supp. 422, 425 (N.D. Ill. 1969). In order, therefore, to establish a violation of the First Amendment, there must be "state action"—here by the federal government—which deprives a group or individual of the speech freedoms guaranteed by the First Amendment.

On its face, the refusal by WTOP–AM to accept BEM's advertisements is "private action" by a private corporate licensee, and therefore not restrained by the Constitution. Yet the "state action" requirement has been found in the actions of many non-governmental persons or corporations. In each case, the private action has been sufficiently "involved" with the state that the restraints of the Constitution have

been found to apply. The question before us, therefore, is whether WTOP–AM's actions are involved with the the federal government to such an extent that the Constitution sets limits to its action. To paraphrase *Farmer* v. *Moses,* 232 F. Supp. 154, 158 (S.D.N.Y. 1964) (grounds of World's Fair equivalent in status to public property), the question is whether WTOP–AM's actions "are so impregnated with and supported by state * * * action as to place them within the ambit of the [First] Amendment * * * even though [WTOP–AM] * * * possesses certain indicia and aspects of 'private' ownership and dominion."

I believe that WTOP–AM's rejection of BEM's advertisements clearly constitute "state action" under a number of state action theories.

A. Public Property

The broadcast frequencies are a valuable and scarce resource belonging to the public. Although broadcast licensees are given the temporary use of this public property for terminable three-year periods, ownership and ultimate control remain vested in the people of the United States. In Section 301 of the 1934 Communications Act, Congress evidenced its clear intention that the broadcast spectrum should remain "public property":

> It is the purpose of this Act * * * to maintain the control of the United States over all channels of interstate and foreign radio transmission; and to provide for the use of such channels *but not the ownership thereof,* by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. [Emphasis supplied.]

The mere fact that the licensee's actions are taken with respect to public property should suffice to meet the test of required "state action." See Tucker v. *Texas,* 326 U.S. 501 (1946) (actions by municipal officials over property of government-owned town comprised "state action").

B. Private Lessee of Public Property

It is equally clear that the requirement of "state action" cannot be evaded by the *lease* of public property, by a public entity, to a private individual. Discrimination by private lessees with respect to public property, for purposes of the First Amendment, has unequivocally been deemed state action by the courts. *E.g., Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961) (state leased space in public building to privately owned restaurant); *Kissinger* v. *New York City Transit Authority,* 274 F. Supp. 438 (S.D.N.Y. 1967) (city "leased" public advertising space on city buses to "private" advertising agency); *Farmer* v. *Moses,* 232 F. Supp. 154, 159 (S.D.N.Y. 1964) ("when a city or state leases public property [such that] * * * services * * * are actually performed by a 'private' lessee, the latter stands in the shoes of the government"); *Anderson* v. *Moses,* 185 F. Supp. 727, 733 (S.D.N.Y. 1960) ("private * * * concessionaire [operated] on public * * * property for the convenience and comfort of the public"); *Hillside Community Church, Inc.* v. *City of Tacoma,* 455 P. 2d 350 (Wash. 1969) (action by private advertising agency, pursuant to "contract" with city, in removing advertisements from municipal buses comprised state action); *Wirta* v. *Alameda-Contra Costa Transit Dist.,* 434 P. 2d 982 (Cal. 1967) (publicly owned advertising space on municipal buses "leased" to private advertising company). In *Marsh* v. *Alabama,* 326 U.S. 501

(1946), a privately-owned "company town" was found to serve a "public function," and that its exclusion of a person seeking to distribute religious literature comprised "action" sufficient to bind it by the requirements of the First Amendment. If under certain circumstances the private owner of private property is bound by state action, then surely the private *user* of *public* property is no less bound. See, *e.g., Tanner* v. *Lloyd Corp.,* 308 F. Supp. 128 (D. Ore. 1970) (privately owned shopping center); *Schwartz-Torrance Inv. Corp.* v. *Bakery & Con. Wkrs. U.,* 394 P. 2d 921 (Cal. 1964) (same).

In sum, therefore, "a broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. * * *" *Office of Communication of United Church of Christ* v. *FCC,* 359 F. 2d 994, 1003 (D.C. Cir. 1966). Surely we could not assume that the federal government has leased public property to private individuals, yet attempted to free them from the obligations of the Constitution. First Amendment obligations are certainly among those imposed upon all broadcast licensees.

C. "Delegation" of State Power

When the state "delegates" its authority over public property to the use and control of a private entity, then the exercise of that use is state action for purposes of the Constitution.

> [W]here a state delegates an aspect of the elective process to private groups, they become subject to the same restraints as the State. [Citation.] * * * That is to say, when private individuals or groups are endowed by the State with powers of functions governmental in na-

> ture, they become agencies or instrumentalities of the State and subject to its constitutional limitations.

Evans v. *Newton,* 382 U.S. 296, 299 (1966) (although a state "delegated" its authority over public park to to private trustees, discriminatory conduct of trustees comprised state action). WTOP-AM has exercised powers of control over its broadcast frequency which are governmental in nature—that is, the exclusion of persons wishing to express their views through a public facility of communication. See, *e.g., Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961) (discrimination by private restaurant lessee using and occupying publicly owned land and building "dedicated to 'public uses'" was state action); *Smith* v. *Allwright,* 321 U.S. 649 (1944) ("state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state"). Because, like any lessee, a broadcaster derives all his power through delegation from the federal government, private actions taken by the broadcaster-licensee-trustee with respect to his trust "res" are imbued with the attributes of state action. A licensee can only exercise the power he has, and the power he has flows from the government.

D. Involvement of Regulatory Agency

In *Public Utilities Comm'n.* v. *Pollak,* 343 U.S. 451 (1952), the Court addressed the question whether action by a privately owned public bus company, regulated by the Public Utilities Commission, was to be treated for purposes of the Constitution as action by a governmental entity. In finding sufficient state action, the Court specifically relied upon the fact that the bus company "operate[d] its service under the

regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress." *Id.* at 462. The Court cited as authority the following proposition from *American Communications Assn.* v. *Douds*, 339 U.S. 382, 401 (1950): "[W]hen authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself." There is little doubt that both the Congress and this Commission are substantially involved in the operations of broadcast licensees. Again this involvement should provide the requisite state action. Indeed, *the Commission itself* has expressly acknowledged that discrimination by licensees may constitute improper state action:

> [A] substantial case has been made that because of the relationship of the government of the United States to broadcast stations, the Commission has a constitutional duty to assure equal employment opportunity. * * * The contention is rested upon such decisions as *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961).

Nondiscrimination Employment Practices of Broadcast Licensees, 18 F.C.C. 2d 240, 241 & n. 2 (1969).

E. State Encouragement or Lack of Neutrality

In *Evans* v. *Newton*, 382 U.S. 296 (1966), a state court permitted a municipality to transfer its control over a public park to private trustees who denied Negroes access to the facility. The Supreme Court barred the discrimination. In a concurring opinion, Justice White pointed out that a provision of state law permitted private trust settlors to dedicate their property to the public for use as a park and limit the

use of that park "to the white race only." Although this statute did not *compel* a settlor to discriminate, it certainly indicated that such an action would be *valid*. According to Justice White, this statute "depart[ed] from a policy of strict neutrality in matters of private discrimination by enlisting the State's assistance only in aid of racial discrimination and * * * involve[d] the State in the private choice. * * *" *Id.* at 306. By encouraging discrimination, although not requiring it, the state sufficiently intertwined itself with private discriminations to constitute state action. See also *Reitman* v. *Mulkey*, 387 U.S. 369 (1967).

There are close parallels with WTOP–AM's censorship of BEM. Section 3(h) of the Communications Act provides that licensees shall not be deemed a "common carrier," and the Commission, reversing prior precedent, see *e.g.*, *United Broadcasting Co. (WHKC)*, 10 F.C.C. 515 (1945), has interpreted this to give licensees the discretion to close their doors to persons seeking to use the station's facilities. See *Letter to Washington Women's Strike for Peace*, Nov. 22, 1965 (cited by the majority in the instant case). I believe that the Commission's interpretations and enforcement of the Communications Act, together with its improperly intentioned reversal of prior Commission doctrine, see *Reitman* v. *Mulkey*, *supra*, provides similar "encouragement" for discrimination by private licensees of the sort involved here. *Cf. Adickes* v. *S. H. Kress & Co.*, 38 U.S.L.W. 4434, 4444 (Sup. Ct., June 2, 1970) (Brennan, J., concurring in part); *Lombard* v. *Louisiana*, 373 U.S. 267 (1963) (statements by Mayor and Superintendent of Police encouraging private discrimination found to be state action). This encouragement should suffice for state action. We need not address the question whether

Section 3(h) of the Act itself "encourages" licensee discrimination sufficient for state action.

F. State Action Through Quasi-Judicial FCC Action

In *Shelley* v. *Kraemer,* 334 U.S. 1 (1948), the Court announced that "action of state courts and judicial officers in their official capacities is to be regarded as action of the State. * * *" *Id.* at 14. Although the Court also suggested that state action might not be found where a State through its court merely "abstained from action, leaving private individuals free to impose such discrimination as they see fit." *Shelley* v. *Kraemer,* 334 U.S. at 19, this distinction beween court "action" and "inaction" has apparently been weakened by later rulings. Thus, in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), the Court remarked, in finding the First Amendment to protect the New York Times against a civil suit by a *private* party, that "[i]t matters not that the law has been applied in a civil action and that it is common law only. * * * The test is not the form in which state power has been applied but, *whatever the form,* whether such power has in fact been exercised." *Id.* at 265 (emphasis supplied). For a discussion of the state action implications of *New York Times Co.* v. *Sullivan,* see Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action,* 1965 Duke L. Rev. 219, 227–30.

In a recent opinion, *Edwards* v. *Habib,* 397 F. 2d 687 (1968), Judge Wright, speaking for the Court, discussed in detail current interpretations of *Shelley* v. *Kraemer.* After a review of the precedents and other prevailing views, he summarized them thus:

> It has been suggested that there is state action, not only when an individual asserts a claim of right against a state, but also when

> he asserts a claim of right against the claims of right of other persons and the state resolves the conflict according to its policy of what is reasonable under the circumstances, *i.e.*, according to its law. [Footnote omitted.] Once this "state action" is established, the question then becomes simply "whether the particular state action in the particular circumstances, determining legal relations between private persons, is constitutional when tested against the various federal constitutional restrictions on state action." [Citing Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 So. Cal. L. Rev. 208, 209 (1957)].
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> * * * On this theory, if it would be unreasonable to prefer [a particular private person's] * * * interests, it would also be unconstitutional.

Edwards v. *Habib, supra* at 695. For commentators discussing this view, see Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action, supra*, at 241–45; Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing*, 52 Calif. L. Rev. 1 (1964); Williams, *The Twilight of State Action*, 41 Texas L. Rev. 347 (1963); Van Alstyne and Karst, *State Action*, 14 Stan. L. Rev. 3 (1961); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment, supra.*

Marsh v. *Alabama*, 326 U.S. 501, 509 (1946), apparently provides support for this view. There, the Court "balance[d] the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion" and stressed that the latter freedoms occupied "a preferred position." See also *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), and

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964), in which state courts were used merely as forums for the resolution of essentially private disputes. In all these cases speech freedoms were involved, and in each case the Court "balanced" the rights to speech under the First Amendment against the rights to the enjoyment of property under the Fifth Amendment.

Rather than forcibly entering the premises controlled by WTOP–AM to broadcast their message through attempted "self-help," BEM has come to this Commission to seek a legal adjudication of its rights. After an investigation of the factual allegations and due consideration of BEM's legal arguments, *cf. Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451, 462 (1952), the Commission has effectively "ejected" BEM from WTOP–AM's facilities. Compare *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) (state trespass laws used to eject picketers from private property). By adjudicating the rights and liabilities of the parties to this matter, and therefore binding the parties to a certain course of action, this Commission has invoked the "full panoply of its power," *Shelley* v. *Kraemer*, 334 U.S. at 19, to banish BEM to silence. This, I believe, should provide sufficient state action to invoke the restraints of the Constitution. This is particularly so when the broadcast licensee is not a purely private entity at all, but is licensed by the federal government and performs a "public function" similar to that performed by the government toward public parks and streets. See *Marsh* v. *Alabama*, 326 U.S. 501, 507 (1946).

G. State "Acquiescence"

In all the cases discussed in the previous sections, the courts have sought to establish at least some

formal connection between private and public action. But in a number of important cases, the immediate "action" necessary to invoke the First Amendment was not direct, affirmative involvement by the government in private conduct, but state "acquiescence" in a certain type of private actions. In all these cases, however, the state had either relinquished its power to private entities (through assignments of control, or leases), or simply abdicated its power role (by failing to impose requirements, for example, on corporate entities under its licensing control). Accordingly, where the power exercised by the private individual is normally or even potentially exercisable by the state, but where the state has relinquished or abdicated that power, then private actions pursuant to that power comprise state action—that is, the "permission" of private discrimination which the state has the power to prevent. In the First Amendment area, therefore, it seems that the refusal by the state to enforce freedom of speech in forums under the potential control of the government may provide sufficient "state action" to restrict the speech abridgement activities of private individuals.

In *Marsh* v. *Alabama,* 326 U.S. 501 (1946), for example, the Court found that a private company town's discrimination involved state *in*action sufficient to invoke the Constitution:

> [*M*]*ere acquiescence* by the State in the corporation's use of its property * * * would still have been performance of a public function and discrimination would certainly have been illegal. * * * And certainly the corporation can no more deprive people of freedom of press and religion than it can discriminate against Commerce. * * * [T]he circumstance that the property rights to the premises where the deprivation of liberty * * * took place, were held by others

> than the public, is not sufficient to justify the State's *permitting* a corporation to govern a community of citizens so as to restrict their fundamental liberties. * * *

Id. at 507 & n. 4, 509 (emphasis supplied). Presumably because the corporation was licensed by the state, and because the corporation performed a "public function" similar to that of any municipality, state abdication of authority comprised state action. To be sure, there was technical "state action" present in *Marsh,* in that the state was asked to enforce its trespass laws against an individual invading private property. But this element could not have been controlling. If, for example, the company had sent its corporate officers out to the town's border to prevent Marsh from setting foot on corporation property, and if Marsh instead had asked for a court injunction to restrain the officers' actions and permit his entry to the corporation's land, the result could have been no different. Compare *Tanner* v. *Lloyd Corp.,* 308 F. Supp. 128, 130 (D. Ore. 1970) (action to compel entry to shopping center).

In *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961), the Court found that discrimination by a privately owned restaurant that had leased its facilities from the state comprised state action. Again, the Court stressed the element of *in*action as supplying a necessary link between private conduct and the Constitution:

> [I]n its lease with [the restaurant] the [State Parking] Authority *could* have affirmatively required [the restaurant] * * * to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively *abdicate* its responsibilities by either *ignoring* them or by

> merely *failing to discharge* them whatever the motive may be. * * * By its *inaction,* the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.

Id. at 725 (emphasis supplied). Other cases are in accord. See, *e.g., Evans* v. *Newton,* 382 U.S. 296 (1966); *Terry* v. *Adams,* 345 U.S. 461 (1953); *Smith* v. *Allwright,* 321 U.S. 649 (1944).

There is, in the case before us, a clear and direct analogy. The government has "delegated" to WTOP–AM the use of valuable public property. Although Congress has exercised its power to prevent licensee censorship in other areas, stating in Section 315(a) that the "licensee shall have no power of censorship over the material broadcast under the provisions of this section," and although the exercise of this power to prevent private censorship seems clearly permissible under the Constitution, *cf. United States* v. *Price,* 383 U.S. 787 (1966); *United States* v. *Guest,* 383 U.S. 745 (1966); *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966), Congress apparently has not barred various forms of licensee censorship by specific legislation. By failing clearly to prohibit licensee censorship, Congress and the Commission have thus "permitted" a form of private censorship which appears inconsistent with the First Amendment.

II. State "Enforcement" of the First Amendment

The division between state and private action is by no means distinct, for the decision to inject the restraints of the Constitution into ostensibly private actions is fundamentally one of policy. A number of commentators, therefore, at least in the Fourteenth Amendment area of racial discrimination, have argued that where important or "preferred" rights are in-

volved, the state cannot tolerate private discrimination or abridgement of those rights. Otherwise, the purposes of the Fourteenth Amendment would be thwarted. Accordingly, they have suggested that the state implicates itself in private action when it *fails affirmatively to enact* legislation barring private discrimination. See, *e.g.*, Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69, 73–74 (1967); Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 Colum. L. Rev. 855 (1966); Henkin, *Shelley* v. *Kraemer, Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473, 481–85 (1962). Thus, according to this view, there is unconstitutional state action whenever the state fails to eliminate private discrimination. According to this theory, the technical requirements of "state action" may be found, via *Shelley v. Kraemer*, in any court action. The only relevant question is where to draw the line between permissible and impermissible state action—since the limitless scope of *Shelley* would apply state action to all judicial cases. According to proponents of this view, the state has the obligation to legislate against private discrimination until that legislation begins to abridge other important, countervailing individual rights, such as liberty, property, and privacy. See, *e.g.*, Black, *supra*, at 100–103. What this means, therefore, is that a state court could still enforce certain kinds of private discrimination, even though the state itself could not discriminate in such a manner. "The state court, for instance, could constitutionally probate a will leaving the deceased's property to the Catholic Church, even though the state could not constitutionally make a comparable disposition of its own funds." *Edwards* v. *Habib*, 397 F. 2d 687, 692 n. 13 (D.C. Cir. 1968) (dictum). "The state,

through its police or courts, could aid an individual in his quest to keep Negroes from a dinner party in his home even though it could not keep Negroes from a courthouse cafeteria or even from a privately owned hotel solely on account of their race." *Edwards* v. *Habib, supra,* at 693 (dictum). The point here is that in either case state action would exist; however, that action would be constitutional, or unconstitutional, depending on a balance of various important rights: liberty, property and privacy, balanced against freedom from racial discrimination.

As yet, this theory has not been frequently applied to discriminatory state action under the First Amendment. This may in part be historical accident, but it may also result from differences in the language of the First and Fourteenth Amendments. On the other hand, as the court in *Edwards* v. *Habib,* 397 F. 2d 687, 693–94 (D.C. Cir. 1968), points out, the Supreme Court in *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 265 (1964), has extended the protection of the First Amendment to the New York Times against action by a *private* individual for libel. The fact that neither Congress nor the State had made a law prohibiting libel was apparently deemed irrelevant. The Supreme Court, therefore, has found sufficient "state action" simply in a state court adjudication of the rights of two private parties.

The California Supreme Court has apparently adopted this position explicitly. *In re Hoffman,* 434 P. 2d 353 (Cal. 1967), involved a trespass conviction of persons seeking to distribute anti-war leaflets on the property of a privately-owned railroad terminal. Citing *New York Times Co. v. Sullivan* and *Marsh v. Alabama,* the Court apparently felt that state action was inherent in its own decision, no matter what the

result, whenever it was required to resolve the competing claims of private individuals:

> If the state curtails First Amendment freedoms to protect an interest that is nonexistent, whether claimed on behalf of the government or on behalf of a private individual, it violates the First and Fourteenth Amendments.

The "curtailment" of First Amendment freedoms by the State could only have been a reference to sanctions imposed *by the court* on the persons distributing the leaflets. State action, in other words, was assumed to exist in the court's decision alone. The only critical question was striking an appropriately weighted balance between speech and other freedoms. This balancing process was simplified for the court in *Hoffman* because the rights of privacy and liberty that normally inhere in property ownership were apparently "nonexistent." Once the owners of the railway terminal had "opened up" their property to the general public, they had (for profit) obviously given up any "privacy" they might otherwise have had. Although the station owners might have reclaimed their privacy by closing the terminal to the public, they could not, at the same time, open it to the public for some purposes, but exclude others on the alleged need for privacy.

Many courts and legal scholars have pointed out the need for affirmative action by the government to protect the rights guaranteed by the First Amendment. In *Associated Press* v. *United States,* 326 U.S. 1 (1945), the Supreme Court wrote:

> It would be strange indeed, however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. * * * Surely a command that the government itself shall not impede the free flow

> of ideas does not afford non-government combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. * * * Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

Id. at 20. And Justice Fortas has remarked, "The courts may not and must not permit either public or private action that censors the press." *Time, Inc.* v. *Hill,* 385 U.S. 374, 420 (1967) (dissenting, joined by Warren, C. J., and Clark, J.).

In *Firstamerica & Dev. Corp.* v. *Daytona Beach News-Journal Corp.,* 196 So. 2d 97, 99 (Fla. 1966) the court observed:

> Freedom of the press was never intended to be a special privilege extended to its publishers. On the contrary, it was conceived by the writers of the Constitution and of the Bill of Rights to be a right of the people in a democracy to unrestricted information and presentation of views on government for which the press was a tailor-made medium of dissemination. Freedom of the press, therefore, is a people's personal right rather than a property right. * * *

Other courts have concurred. "Those [constitutional] guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society." *Time, Inc.* v. *Hill,* 385 U.S. 374, 389 (1967). "[F]reedom of the press is a right which belongs to the public; it is not the private preserve of those who possess the implements of publishing." *State* v. *Buchanan,* 436 P. 2d 729, 731 (Ore. 1968). "It is the right of the viewers and listeners, not the right of the broadcasters, which

is paramount." *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367, 390 (1969).

There is, in fact, a strong argument that Congress, through the Communications Act of 1934, enforced the First Amendment in the area of broadcasting by applying its restraints to private licensees. According to this view, Congress intended licensees to operate in the public interest, convenience and necessity, and this necessarily entailed patterns of operation consistent with First Amendment prohibitions on censorship. Indeed, at one time the Commission itself apparently adopted this view. In *United Broadcasting Co.* (*WHKD*), 10 F.C.C. 515 (1945), for example, the Commission said: "The spirit of the Communications Act of 1934 requires radio to be an instrument of free speech," and it warned against "any type of censorship which would undertake to impose the views of the licensee on the material to be broadcast." *Id.* at 517–18. If the Communications Act does apply the First Amendment to broadcasters, then the search for state action becomes unnecessary.

Yet what has happened to that free and open "marketplace of ideas" since the founding of our country? As R. H. S. Crossman has seen, a new political, economic and social revolution "has concentrated coercive power and thought control in a few hands." Power has shifted from those who control the "means of production" to "those who control the media of mass communication and the means to destruction (propaganda and the armed forces)." R. H. S. Crossman, *The Politics of Socialism* 44 (1965). Another commentator has noted, "it is not that the mass communication industry is pushing certain ideas and rejecting others but rather that it is using the free speech and free press guarantees to avoid opinions instead of acting as a sounding board for their ex-

pression." Barron, *Access to the Press—A New First Amendment Right,* 80 Harv. L. Rev. 1641, 1646 (1967). And V. O. Key has warned:

> [A]ttention to the economic aspects of the communications industries serves to emphasize the fact that they consist of commercial enterprises, not public service institutions. * * * They sell advertising in one form or another, and they bait it principally with entertainment. Only incidentally do they collect and disseminate political intelligence. * * * [N]ewspaper publishers are essentially people who sell white space on newsprint to advertisers. * * *

V. O. Key, *Public Opinion and American Democracy* 378–79 (1961).

The growing concentration of power over the media of communication into private corporate hands will require new concepts of "state action" if freedom of speech is to be preserved. Private corporate censorship by radio and television licensees must become a thing of the past if dissent and diversity of views in this country is to flourish. See generally *Letter to Hon. Richard L. Ottinger* [*Judy Collins incident*], FCC Public Notice No. 47876, April 20, 1970 (dissenting opinion); Johnson, *Public Channels and Private Censors,* The Nation, March 23, 1970, p. 329. There is, therefore, a direct legal and social connection between the power of the mass media, whose owners stand like a colossus astride the channels of communications, and the state action requirement that the First Amendment's protection does not become operative until speech is abridged by a government-involved entity. *Marsh v. Alabama,* 326 U.S. 501 (1946), is perhaps the opening wedge. It holds that private corporations must not be unleashed to abridge personal freedoms at will. A. J. Berle, in commenting on

Marsh v. Alabama, has stated this important principle with great perceptivity:

> The emerging principle appears to be that the corporation * * * is as subject to constitutional limitations which limit action as is the state itself. * * * The preconditions of application are two: the undeniable fact that the corporation was created by the state and the existence of sufficient economic power concentrated in this vehicle to invade the constitutional right of an individual to a material degree. This is new as a rule of law, but it is typically American in tradition. * * * The principle is logical because * * * the modern state has set up, and come to rely on, the corporate system to carry out functions for which in modern life by community demand the government is held ultimately responsible. It is unlimited because it follows corporate power whenever that power actually exists. * * * Instead of nationalizing the enterprise, this doctrine "constitutionalizes" the operation.

Berle, *Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power,* 100 U. Pa. L. Rev. 933, 942–43 (1952); see also, St. Antoine, *Color Blindness But Not Myopia: A New Look at State Action, Equal Protection and 'Private' Racial Discrimination,* 59 Mich. L. Rev. 993 (1961); Miller, *The Constitutional Law of the 'Security State,'* 10 Stan. L. Rev. 620, 661–66 (1958).

There are only a limited number of ways in which a person can obtain access to the mass media of communication: (i) buy a radio or television station; (ii) buy commercial space for promotion of goods and services; (iii) develop a situation worthy of news coverage (*e.g.,* demonstrations, street marches, etc.); (iv) obtain the sympathy of an editorial staff member who

will present one's views by "proxy"; (v) obtain rebuttal time under the fairness, personal attack, or equal time doctrines; or (vi) purchase time for noncommercial speech. Yet in every case, access to the most important media of communication our century have seen is severely limited.

Thus, (i) the Commission has already taken steps to make access through ownership even more difficult than it already is. See *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants,* 35 Fed. Reg. 822 (1970); *Petitions by B.E.S.T.,* 21 F.C.C. 2d 355 (1970), *reconsideration denied,* FCC 70–738 (July 21, 1970). (ii) Commercial space for goods and services both excludes those with purely political or social speech, and abdicates the bulk of radio and television "access time" to monolithic commercial and corporate enterprises. (iii) Demonstrations and street marches soon fade in newsworthiness, and people wishing to reach the bulk of the American people must increasingly resort to the tactics of extremism to capture the largess of the television eye. (iv) The sympathy of a radio or television station's editorial staff is often difficult to obtain, and is perhaps nonexistent in those communities with few radio or television outlets. And (v), the Commission has been reluctant to apply the fairness doctrine evenhandedly to those with minority or dissenting views. See, *e.g., Letter to Mr. Donald A. Jelinek,* FCC 70–595 (June 4, 1970) (anti-military recruitment announcements); *Letter to Mrs. Dorothy Healey,* FCC 70–658 (June 24, 1970) (attack on member of Communist Party for "unpatriotic" views).

Only (vi), therefore, the ability to purchase time at going commercial rates, can offer many Americans any opportunity for electronic speech. Although the First Amendment was not enacted to sanctify the

views held by the corporate owners of the mass media, government inattention and failure to "enforce" the First Amendment has had that effect. Accordingly, "non-commercial access" may be required under the First Amendment to preserve or create a true "marketplace of ideas" in the electronic media. Both commentators and courts have recognized this proposition. See, *e.g.*, Silver, *Free Speech on Private Property*, 19 Cleveland State L. Rev. 372 (1970); Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 Geo. Wash. L. Rev. 487 (1969); Horning, *The First Amendment Right to a Public Forum*, 1969 Duke L. Rev. 931; Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1644–50 (1967); Gorlick, *Right to a Forum*, 71 Dick. L. Rev. 273 (1967); Note, *The Listener's Right to Hear in Broadcasting*, 22 Stan. L. Rev. 863 (1970); Note, *Resolving the Free Speech—Free Press Dichotomy: Access to the Press Through Advertising*, 22 U. Fla. L. Rev. 293, 304 (1969).

I conclude, therefore, from the foregoing discussion, that BEM's advertisements are constitutionally protected speech under the First Amendment, and that WTOP–AM's action in refusing that proffered speech is sufficiently involved with the state to invoke the restraints of the Constitution. I have engaged in this detailed treatment of "state action" for one principal reason: to lay conclusively to rest any argument that licensees have the freedom to censor at will, unrestrained by the First Amendment. They do not. Radio and television licensees, when they act vis-a-vis the people, must be treated, for purposes of the Constitution, as if they were agents of the government. Broadcast licensees have no more absolute right to impose bans on speech over their facilities than do groundskeepers in public parks. In all cases involving

demands for "access" to the mass media, the only question is whether the broadcaster's restrictions and limitations are *reasonable*. A licensee may obviously impose reasonable "time, place and manner" restrictions upon the use of his facility; but he can no more absolutely ban certain kinds of speech or types of speakers than the government can ban citizens from public parks and streets. *Cf. Hague v. CIO,* 307 U.S. 296 (1939).

III. THE "APPROPRIATENESS" OF THE SPEECH IN THE PARTICULAR FORUM

Over the past few years, the courts have dealt with a number of cases in which persons wished to exercise speech freedoms in conjunction with public or private property—for example, public streets and parks, train stations, bus terminals, schools, and so forth. In most of these cases, the court has first established the existence of state action (or disposed of it as unimportant). Then, the court has asked two types of questions: first, is the property in issue an appropriate forum for the communication of views; and second, has the person owning or controlling that forum "discriminated" between individuals or particular views in a manner which is inconsistent with the Constitution. The answer to the first question normally depends on whether the property has "traditionally" been used as a forum for communication, as in *Hague* v. *CIO, supra,* or whether the property has been "opened up" to the general public in such a manner that speech on that property would be a normal activity. The answer to the second question has generally turned on whether the property owner's restrictions on speech are "reasonable," and this in turn depends on whether the speech interferes with any important property right (such as privacy, exclusive possession, freedom from inter-

ference or obstruction, etc.) which is *worth preserving.* As stated in *In re Hoffman,* 434 P. 2d 353 (Cal. 1967), the courts will not curtail First Amendment freedoms "to protect an interest that is *nonexistent.* * * *" *Id.* at 356 (emphasis supplied).

The doctrines evolved by the courts are contained in the following proposition: When private property, which is an appropriate forum for communication, is "opened up" to general use by the public, then the "private" owner of that property "waives" his traditional property rights to privacy and exclusivity of use, and cannot abridge the speech rights of individuals seeking to use his "forum" for the expression of views. Under certain circumstances (although perhaps not in the broadcast area), the private owner may entirely close his property to the public; but, if he opens it at all, he demonstrates that he has no real property interest of "privacy," and he cannot therefore close it selectively to specific persons or particular views.

A. Existence of a "Forum"

In *Marsh* v. *Alabama,* 326 U.S. 501 (1946), a person seeking to distribute religious literature on the streets of a privately owned "company town" was prosecuted for trespass at the instance of the company owners. The Court reversed, finding that the privately owned town in fact performed a "public function" similar to that of any town, whether private or publicly owned, and stated:

> Ownership does not mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. * * *

> * * * Whether a corporation or a municipality owns or possesses the town, the public in either case has an identical interest in the functioning of the community in such a manner as the channels of communication remain free.

Id. at 506, 507. Although the Court felt the private corporation could entirely "close the sidewalk" to the public, *Marsh* v. *Alabama, supra* at 505 n. 2, the corporation could not "discriminate" against certain religious views once it had generally opened the sidewalk up to the public. *Id.* at 507.

Many other cases have followed the doctrine of *Marsh* v. *Alabama,* holding that in certain circumstances private property "may, at least for First Amendment purposes, be treated as though it were publicly held." *Amalgamted Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308, 316 (1968). See, *e.g., Tanner* v. *Lloyd Corp.,* 308 F. Supp. 128 (D. Ore. 1970); *Hillside Community Church, Inc.* v. *City of Tacoma,* 455 P. 2d 350 (Wash. 1969); *In re Lane,* 457 P. 2d 561 (Cal. 1969); *In re Hoffman,* 434 P. 2d 353 (Cal. 1967); *Schwartz-Torrance Inv. Corp.* v. *Bakery & Con. Wkrs. U.,* 394 P. 2d 921 (Cal. 1964); *Amalgamated Cloth. Wkrs.* v. *Wonderland Shop. Ctr.,* 122 N.W. 785 (Mich. 1963) (affirmance by equally divided court). For other cases in which the court found the existence of a "public forum" for communication of views, see *e.g., Tinker* v. *Des Moines School Dist.,* 393 U.S. 503 (1969) (public school); *Wolin* v. *Port of New York Authority,* 392 F. 2d 83 (2d Cir. 1968) (bus terminal); *Zucker* v. *Panitz,* 299 F. Supp. 102 (S.D.N.Y. 1969) (public high school newspaper); *Kissinger* v. *New York City Transit Authority,* 274 F. Supp. 438 (S.D.N.Y. 1967) (public subway walls); *Wirta* v. *Alameda-Contra Costa Transit District,* 343 P. 2d 982 (Cal. 1967)

(public busses); *Danskin* v. *San Diego Unified School Dist.*, 171 P. 2d 885 (1946) (public school buildings); *People* v. *St. Clair*, 56 Misc. 2d 326, 288 N.Y.S. 2d 388 (Crim. Ct. 1968) (public subway platform).

In sum, these cases all stand for the proposition that where property, publicly or privately owned, is "opened up" for general use by the public, whether or not that use directly involves speech activities, then the facility cannot be closed to speech unless its exercise directly and substantially interferes with the facility's primary use—for example, as a shopping center, bus station, railway terminal, subway, or school.

In the case before us involving WTOP-AM's rejection of BEM's advertisements, there seems little question that the frequency controlled by WTOP-AM is a "forum" for the communication of ideas. Indeed, that appears to be its exclusive purpose, whether those ideas be political, commercial or entertainment. And there is also no question that WTOP-AM has "opened up" the use of that frequency to the general public—by making *commercial* advertising time available to the general public on a first-come, pay-as-you-go basis. See, *e.g.*, *Kissinger* v. *New York City Transit Authority, supra; Zucker* v. *Panitz, supra; Hillside Community Church, Inc.* v. *City of Tacoma, supra;* and *Wirta* v. *Alameda-Contra Costa Transit District, supra,* all cases in which the owner of private or public property opened up his facility for the display of private commercial advertisements. In each case, the court found that a "public forum" for the communication of views was present. Whether or not WTOP-AM's opening of its forum for the communication of private commercial views constitutes an "opening up" for non-commercial (but also paid) views, will be considered below.

B. "Reasonable" Use of Forum

Every licensee must retain some power to reject programming—if only when it fails to meet certain quality standards, or violates federal law (lotteries, obscenity, etc.). But just as clearly the licensee, as a trustee for the public, does not possess unlimited power to monopolize the use of the airwaves. The essential question, therefore, is whether the use of advertising "space" or the broadcast spectrum by BEM is "reasonable" and consistent with other uses of that spectrum by the licensee.

The Commission and the courts must begin to draw guidelines for "reasonable" access to the broadcast frequencies, seeking to ensure that the electronic media of twentieth century communication are as open to the public as the soap boxes, public parks, and town hall meetings of the last century. *Cf.* Kalven, Jr., *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 Sup. Ct. Rev. 1, 21–32. On the one hand, "[t]he rights of free speech * * * do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." *Cox* v. *Louisiana*, 379 U.S. 536, 554 (1964) (Goldberg, J.). But on the other hand, "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment." *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367, 390 (1969).

The FCC and the courts have already begun to develop variants of the access doctrines latent in *Red Lion*. The fairness, personal attack, and equal time doctrines all curtail the licensee's discretion to reject programming. So does the requirement that the licensee ascertain community needs and interests and devote "some significant proportion of [its] * * *

programming" to them. *City of Camden,* 18 F.C.C. 2d 412, 421 (1969). In light of the "state action" discussion above there may well be limits on the ability of a licensee to censor out of a prepared program, during broadcast, the remarks of an invited guest. See *Letter to Cong. Richard L. Ottinger* [*Judy Collins incident*], FCC Public Notice No. 47876, April 20, 1970 (dissenting opinion). In the case here before us, BEM is willing to pay the "going commercial rate" to gain access to WTOP-AM's facilities. Therefore, unlike fairness doctrine cases, a requirement of access imposed on WTOP-AM with respect to this anti-war announcement *would impose no financial burden on the station.* This is an extremely important point. Compare *Letter to Mr. Donald A. Jelinek,* FCC 70-595, (June 4, 1970) (dissenting opinion at pp. 21-22) (free public service announcements would impose no financial burden on licensee). So long as the party seeking access to a broadcast facility is willing to pay the going rate, we need not face the equal protection question posed by persons financially unable to pay for their "privilege" of electronic speech.

The state and federal courts have, during the past few years, addressed precisely the same question before this Commission—although in the somewhat different context of *spacial* forums (parks, streets, train terminals, etc.), and not *electronic* forums. In every case involving persons who sought only to use the advertising facilities provided to commercial advertisers, the courts decisively ruled that the owner of the property in question could not admit commercial advertisements and exclude political ones.

The germinal case in this area was decided by the California Supreme Court in 1967. In *Wirta* v. *Alameda-Contra Costa Transit Dist.,* 434 P. 2d 982 (Cal. 1967), the members of Women for Peace

brought suit against a public Transit District, operating the municipal bus service, and a private advertising company which serviced the Transit District's buses. The buses contained advertising space above the passengers' seats, and the Transit District leased that space to the advertising company which, in turn, re-leased it to private commercial advertisers. (The parallel with FCC licensing of public property to private licensees who re-lease that frequency space to commercial advertisers is obvious.) In 1964, Women for Peace requested that it be allowed to place the following advertisement in defendants' coaches, at the standard rate:

> "Mankind must put an end to war or war will put an end to mankind."
>
> President John F. Kennedy.
>
> Write to President Johnson: Negotiate Vietnam.
>
> Women for Peace
> P. O. Box 944, Berkeley."

Defendants refused to accept the advertisement, on the ground that the advertisement conflicted with the District's advertising policy:

> The * * * District * * * accepts only commercial advertising for the sale of goods and services, except that political advertising will be accepted in connection with and at the time of a duly called election being held within the boundarys of the District, and further subject to the conditions that * * * space be made equally available to opposing candidates or sides of a ballot measure.

The advertisement in question was rejected on the ground that "controversial subjects" were not consistent with this policy. (Again, the parallels with WTOP–AM's policy, as well as the Commission's equal time doctrine, are obvious.)

The court first asserted that the content of the advertisement was "undeniably protected by the First Amendment," despite its status as a paid message. 434 P. 2d at 984. It then observed that the advertisements in question could not conceivably interfere with the District's primary function of providing transportation. 434 P. 2d at 985. And the court then defined the problem as one "in which a governmental agency [the parallel to WTOP–AM has been made in the previous section] has refused to accept an advertisement expressing ideas admittedly protected by the First Amendment for display in a forum which the agency has deemed suitable for the expression of ideas through the medium of paid advertisements." 434 P. 2d at 985. The court concluded:

> [D]efendants, *having opened a forum* for the expression of ideas by providing facilities for advertisements on its buses, *cannot* for reasons of administrative convenience decline to accept advertisements expressing opinions and beliefs within the ambit of First Amendment protection.

434 P. 2d at 985 (emphasis supplied). The "vice" of the district's censorship lay in choosing "between classes of ideas * * *, sanctioning the expression of only those selected, and banning all others." This the court described as "a most pervasive form of censorship." 434 P. 2d at 986.

The court also expressed itself with absolute bluntness on the perversity of elevating commercial speech to a status more important than political speech. "[I]n the totality of man's communicable knowledge," the court said, "that which bears no relationship to material value preponderates." 434 P. 2d at 986. The court observed:

> A cigarette company is permitted to advertise the desirability of smoking its brand, but

> a cancer society is not entitled to caution by advertisements that cigarette smoking is injurious to health. A theater may advertise a motion picture that portrays sex and violence, but the Legion of Decency has no right to post a message calling for clean films. A lumber company may advertise its wood products, but a conservation group cannot implore citizens to write to the President or Governor about protecting our natural resources. An oil refinery may advertise its products, but a citizens' organization cannot demand enforcement of existing air pollution statutes.

434 P. 2d at 986–87.

Finally, the court relied upon a companion case, *In re Hoffman,* 434 P. 2d 353 (Cal. 1967), to state the controlling issue before it: "the test is not whether petitioners' use of the station was a railway use, but whether it *interfered* with that use." 434 P. 2d at 356 (emphasis supplied). Because the bus company was unable to show that presentation of political commercials interfered with *any* legitimate function of its transportation function, its refusal to accept political advertising was impermissible.

The analogies to WTOP–AM are almost exact. WTOP–AM is, for purposes of the First Amendment, an "agent" of the state—just as was the private advertising agency leasing "public property" from the transit authority. WTOP–AM rejected BEM's advertisement, also on the ground that it accepted only "commercial" advertising. There was no evidence that acceptance of the advertisement would "interfere" with WTOP–AM's normal function of presenting advertising space to sponsors and entertainment programming to listeners. One must conclude, therefore, that WTOP–AM cannot reject BEM's advertisements any more than the transit authority could reject those of the Women for Peace.

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In *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 328 (S.D.N.Y. 1967), the court reached precisely the same result as in *Wirta*, and for identical reasons. There too an anti-war group wanted to place an advertisement on the walls of the subway; a private advertising corporation, operating under contract to the city, refused, due to the "controversial" nature of the views expressed.

The Transit Authority made two arguments. First, they argued that they only accepted commercial advertisements, public service announcements, and political advertising during election—and that acceptance of these was not a generalized waiver to include political advertisements. The Court quickly rejected this argument, stating that the Authority and the Advertising Company "cannot accept some posters and refuse the plaintiffs' for reasons that conflict with the First Amendment guarantee of the right to freedom of speech." 274 F. Supp. at 442. Second, the Transit Authority argued that the posters were inflammatory, would be displayed to a "captive audience," and might cause disorder and irritation. Again the court swiftly disposed of this argument. Citing *Terminiello* v. *City of Chicago*, 337 U.S. 1, 4 (1949), the court said:

> [A] function of free speech * * * is to invite dispute * * *. Speech is often provocative and challenging. It may * * * have profound unsettling effects. * * * That is why freedom of speech is * * * protected against censorship * * *.

The parallel with the case involving WTOP–AM again is obvious.

In *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969), a group of high school students brought an action for declaratory and injunctive relief to compel

a high school newspaper to accept a paid advertisement in opposition to the Vietnam war. The defendant school authority argued that the paper's policy was to accept "only purely commercial advertising" and to reject all advertising (even in support of student government nominees) which was politically oriented. Citing *Wirta,* the court ruled in the plaintiff's favor:

> Here, the school paper appears to have been open to free expression of ideas in the news and editorial columns as well as in letters to the editor. It is patently unfair in light of the free speech doctrine to close to the students the forum which they deem effective to present their ideas.

299 F. Supp. at 105. The court could see no disruption of the newspaper's normal function that could conceivably result from the antiwar advertisements.

Finally, in *Hillside Community Church, Inc.* v. *City of Tacoma,* 455 P. 2d 350 (Wash. 1969), a church group sought to place "end the war in Vietnam" posters on transit buses operated by the city of Tacoma, Washington, where advertising space was under the control of a private lessee advertising agency. Citing *Wirta* and *Kissinger,* the court ruled that "[o]nce a municipality or public body enters the field of advertising, therefore, the law requires that a showing of a 'clear and present' danger must be made in order to limit such advertising without conflicting with guarantees of freedom of speech under the First and Fourteenth Amendments." 455 P. 2d at 354. The court found the rejection to be "clear acts of censorship" in violation of plaintiff's first amendment rights.

The licensee has argued that subjects of the type contained in the BEM advertisements "require a more in-depth analysis than can be provided in a 10, 20, 30, or 60 second announcement." It seeks to use

this pathetically weak justification to overcome the Supreme Court's "clear and present danger" test, see *Hillside, supra,* and the First Amendment to the Constitution. This reasoning must be rejected out of hand. Once WTOP–AM has opened its forum up to 10, 20, 30, and 60 second commercial spots, it cannot withhold similar time periods from persons seeking to fill them with political speech. It borders on arrogance for WTOP–AM to assert that $4–5,000 automobiles which pollute the air and endanger human life may be sold to an unsuspecting public in 30 second spot announcements, but that the simple message, "End the War in Vietnam," cannot be communicated in a short announcement. Neither the government, nor a licensee, must be permitted to arrogate to itself the totalitarian role of deciding, *for the people wishing to speak,* how they will be permitted to present their thoughts. Similarly harsh and unjustifiable restrictions have been struck down in many other related cases, and I need not detail their reasoning here. See *e.g., Wolen* v. *Port of New York Authority,* 392 F. 2d 83 (2d Cir. 1968); *Tanner* v. *Lloyd Corp.,* 308 F. Supp. 128 (D. Ore. 1970); *In re Lane,* 457 P. 2d 561 (Cal. 1969); *People* v. *St. Clair,* 288 N.Y.S. 2d 388 (Crim. Ct. 1968); *In re Hoffman,* 434 P. 2d 353 (Cal. 1967); *Schwartz-Torrance Inv. Corp.* v. *Bakery & Con. Wkrs. U.,* 394 P. 2d 921 (Cal. 1964).

The argument has been made that if WTOP–AM is forced to accept political advertisements, then commercial space will become limited. These arguments have also been considered by the courts, and summarily rejected. In *Kissinger* v. *New York City Transit Authority,* 274 F. Supp. 328 (S.D.N.Y. 1967), the court remarked:

> Defendants also argue that if they accept the posters for display, they will have to accept

> other posters relating to [political issues] * * * with the result that commercial advertising will become curtailed and the subways will become a political and ideological battlefield. Even if the Authority and the Advertising Company are required to accept the posters for display, however, it does not follow that others must be accepted. * * * [T]he Authority and the Advertising Company could impose reasonable regulations on the display of plaintiffs' posters and others of a similar nature as to the number to be displayed and the time and place for their display.

See also, *Farmer* v. *Moses*, 232 F. Supp. 154 (S.D.N.Y. 1964); *Wirta* v. *Alameda-Contra Costa Transit Dist.*, 434 P. 2d 982 (Cal. 1967). Access to WTOP-AM's facilities for a "reasonable" number of political advertisements need not open the floodgates to a limitless political battleground—although in many respects this might be preferable to the existing commercial wasteland we see spread out before us today. Nothing would prevent the licensee or the Commission from adopting "reasonable" limitations on the number of both commercial and political advertisements to be broadcast.

Perhaps not surprisingly, the Commission has adopted precisely such an approach in prior cases. In *United Broadcasting Co.* (*WHKC*), 10 F.C.C. 515 (1945), for example, a labor union filed a complaint against a licensee for refusing to sell the union time to solicit memberships and discuss controversial subjects (such as "race, religion, and politics"). The Commission designated the station's license renewal for hearing to determine "*the duties* of a licensee * * * to maintain an overall program balance by providing time on a nondiscriminatory basis for discussion of public controversial issues and for the solicitation of

memberships for nonprofit organizations." *Id.* at 517 (emphasis supplied). During the hearing, it developed that the station's policies were governed by the Code of the National Association of Broadcasters. The Code provided that "no time shall be sold for the presentation of public controversial issues, with the exception of political broadcasts * * * and that solicitation of memberships in organizations, whether on paid or free time, should not be permitted except for charitable organizations, such as the American Red Cross. * * *" *Id.* at 516. Following the hearing, both parties filed a joint motion, stating that the licensee had adopted a new policy, and asking for dismissal of the proceedings. The new policy stated, in pertinent part:

> (a) * * * Station WHKC [will] * * * consider each request for time solely on its individual merits without discriminations and without prejudice because of the identity of the personality of the individual, corporation, or organization desiring such time.
>
> (b) Requests * * * will * * * be considered in the light of the contribution which their use of time would make toward a well-balanced program schedule. * * *
>
> (c) Station WHKC will make time available, primarily on a sustaining basis, *but also on a commercial basis,* for the full and free discussion of issues of public importance, including controversial issues, and dramatizations thereof. * * * [T]here will be *no discrimination between business concerns and nonprofit organizations.* * * * Nonprofit organizations will have the right to purchase time for solicitation of memberships.
>
> * * * * *
>
> (e) The censorship of scripts is an evil repugnant to the American tradition of free

> speech and a free press, whether enforced by a Government agency or by a private radio station licensee. * * * Station WHKC will not censor scripts, or delete any matter contained in them. * * *
>
> (f) The station will see that its broadcasts on controversial issues * * * maintain a fair balance among the various points of view * * *, both sustaining and commercial alike.
>
> The parties believe that the above statement of policy properly sets forth *the duties* of a licensee under the Communications Act of 1934. * * *

United Broadcasting Co. (WHKC), supra at 516–17 (emphasis supplied).

The Commission, on the basis of this newly adopted policy statement, dismissed the proceedings. Stating that the policy was "fair and nondiscriminatory," *id.* at 518, we said:

> The Commission * * * is of the opinion that the operation of any station under the *extreme principles that no time shall be sold for the discussion of controversial public issues* and that only charitable organizations and certain commercial interests may solicit memberships is inconsistent with the concept of public interest established by the Communications Act as the criterion of radio regulations. * * * The Commission recognizes that good program balance may not permit the sale or donation of time to all who may seek it for such purposes and that difficult problems calling for careful judgment on the part of station management may be involved in deciding among applicants for time when all cannot be accommodated. However, competent management should be able to meet such problems in the public interest and with fairness to all concerned. The fact that it places an arduous task on management should not be made a reason for evading the issue by a *strict rule against the sale of time for any programs of the type mentioned.*

Id. at 518 (emphasis supplied).

The point is simply that the Commission has previously ruled that this policy comports with the *"duties"* of a licensee, and that refusals to sell time for the discussion of controversial issues of public importance would violate the 1934 Communications Act. The Commission clearly stated that a "strict rule" against the sale of such time would be "extreme," and that "competent management" should be able to preserve balance and fairness between applicants. BEM asks for no more here. That this Commission has retrogressed in the 25 years since its *WHKC* opinion is a sad commentary indeed.

IV. SECTION 3(H) AND "COMMON CARRIERS"

Section 3(h) of the 1934 Communications Act provides, in rather uninformative fashion:

> "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy * * *; *but a person engaged in radio broadcasting shall not insofar as such person is so engaged, be deemed a common carrier.*

47 U.S.C. 153(h) (1964) (emphasis supplied). The majority has seized upon this general language to argue that a licensee has the power categorically to reject *all* requests by politically-oriented groups to purchase time. According to the majority, "[i]f the licensee were deemed to be a common carrier, . . . the result would be not only chaotic but a wholly different broadcasting system which Congress has not chosen to adopt." There are a number of reasons why this argument is faulty.

First, it is interesting to note that the Commission itself has rejected this argument in prior cases. In *United Broadcasting Co.* (*WHKC*), 10 F.C.C. 515 (1945), for example, discussed above, the Commission clearly stated that Section 3(h) of the Act in no way interfered with the "duty" of licensees to make a reasonable amount of time available for purchase or on a sustaining basis to persons wishing to discuss issues of controversy and public importance:

> It is recognized, of course, that the physical limitations on the amount of spectrum space available for radio broadcasting and the large demands upon radio stations for use of time make it impossible for every person desiring to use the facilities of a station to be granted this privilege. Under section 3(h) of the act, broadcast stations are expressly declared not to be common carriers. These facts, however, in no way impinge upon the duty of each station licensee to be sensitive to the problems of public concern in the community *and to make sufficient time available, on a nondiscriminatory basis, for full discussion thereof, without any type of censorship which would undertake to impose the views of the licensee upon the material to be broadcast.* The spirit of the Communications Act of 1934 requires radio to be an instrument of free speech, subject only to the general statutory provisions imposing upon the licensee the responsibility of operating its station in the public interest.

Id. at 517–18 (emphasis supplied).

Second, it seems clear, at least from the cited passage, that Section 3(h), whatever its function, was not designed to permit licensee flatly to reject advertisements for non-commercial or controversial causes. It seems likely that Congress, in enacting Section 3(h), intended only to make the rather detailed and com-

plicated "Common Carrier" provisions in Title II of the 1934 Act inapplicable to broadcasting. A right of reasonable access, sought here by BEM, would certainly be consistent with the principles enunciated in *United Broadcasting Co. (WHKC), supra,* without involving Title II of the Act. Obviously, even under the access principles sought by BEM a licensee would not be forced to take *everyone* who sought air time. After all, a licensee may not have enough airtime or frequency space available to accommodate all those wishing to advertise. But it does not follow, either, that a licensee can *exclude* everyone who seeks access. There are many ways of permitting reasonable access by non-commercial advertisers without having to accept them all. Licensees, for example, might decide to accept 50% commercial and 50% non-commercial advertising. In each category, some might be turned away—for any number of reasons. But the broadcaster would still be obliged to maintain an adequate "balance" between viewpoints for purposes of the fairness doctrine. And we have already ruled that "competent management should be able to meet such problems in the public interest." *United Broadcasting Co. (WHKC)*, 10 F.C.C. 515, 518 (1945). This principle was underscored by the court in *Office of Communication of United Church of Christ v. FCC,* 359 F. 2d 994 (D.C. Cir. 1966), when it said:

> The argument that a broadcaster is not a public utility is beside the point. True it is not a public utility in the same sense as strictly regulated common carriers or purveyors of power, but neither is it a purely private enterprise like a newspaper or an automobile agency.

Id. at 1003.

A third defect in the majority's reasoning is that the Commission itself has, on several occasions, lim-

ited the discretion of licensees to accept or reject persons wishing to use their facility to express views. *In Letter to Nicholas Zapple,* FCC 70–598 (1970), for example, we ruled that when a spokesman for a political candidate appears in support of that candidate over a radio or television station, then, even though the equal time requirements of Section 315(a) of the Communications Act are inapplicable, the licensee *must* nevertheless give equal opportunties to supporters of the opposing candidate. Such opposing supporters would not only be the "appropriate" and "logical" persons to reply, but as we stated, "it would not be reasonable" for a licensee to refuse such a spokesman time. In 1968, on another occasion, we stated that under certain circumstances the fairness doctrine would require a licensee to put on one particular person—where "[t]here is a clear and appropriate spokesman to present the other side of the attack issue—the person or group attacked." *Memorandum Opinion and Order,* 12 F.C.C. 2d 250, 252–53 (1968).

The point is simply that these requirements do not violate Section 3(h) of the Act, even if they do require a licensee to accept the programming offered by a specific person. A system of reasonable access is perfectly consistent with Section 3(h) of the Act. Not only that, it is *required* by the First Amendment under the principles described above. The principles and policies of the First Amendment do not dictate the amount of non-commercial advertising licensees must accept. They require only that licensees must accept *some* non-commercial advertising, and that the amount accepted must be *reasonable.*

CONCLUSION

In sum, BEM's advertisements are protected speech under the First Amendment; WTOP-AM's actions in rejecting the advertisements subject it, under concepts of state action, to the restraints and policies of that Amendment; WTOP-AM has presented no reasonable justification for its discrimination between commercial and non-commercial advertising; and Section 3(h) of the Communications Act is perfectly consistent with procedures permitting a right of reasonable access to the broadcasting media for political advertisements.

Accordingly, I would grant the petitioners' request and enforce their demand for access to the public facilities guarded so zealously by the licensee. This the majority has refused to do. I dissent.

APPENDIX D

United States Court of Appeals for the District of Columbia Circuit

[Filed Aug. 3, 1971, Nathan J. Paulson, Clerk]

No. 24492

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC., INTERVENOR

[Filed Oct. 22, 1971, Nathan J. Paulson, Clerk]

No. 24537

DEMOCRATIC NATIONAL COMMITTEE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING CO., INC., INTERVENOR

COLUMBIA BROADCASTING SYSTEM, INC., INTERVENOR

September Term, 1970

Petitions for Review of Orders of the Federal Communications Commission

Before: WRIGHT, McGOWAN and ROBINSON, Circuit Judges

JUDGMENT

These cases came on to be heard on the records from the Federal Communications Commission, and were argued by counsel. On consideration thereof, it is

Ordered and adjudged by this Court that the orders of the Federal Communications Commission on review herein are hereby reversed and the cases are remanded to the Fedeal Communications Commission for further proceedings in accordance with the opinion of the Court filed this date.

A true copy:
Test: NATHAN J. PAULSON, Clerk, United States Court of Appeals for the District of Columbia Circuit.
By: Dorothy E. Long, Deputy Clerk.

Per Curiam.
For the Court:
NATHAN J. PAULSON,
Clerk.

Dated: August 3, 1971.
Opinion by Circuit Judge Wright.
Separate dissenting opinion by Circuit Judge McGowan.
Reissued: October 29, 1971.

NATHAN J. PAULSON,
Clerk, U.S. Court of Appeals
for the District of Columbia Circuit.

APPENDIX E

United States Court of Appeals, for the District of Columbia Circuit

No. 24492

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

POST-NEWSWEEK STATIONS, CAPITOL AREA, INC., INTERVENOR

No. 24537

DEMOCRATIC NATIONAL COMMITTEE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION & UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING CO., INC., INTERVENOR

COLUMBIA BROADCASTING SYSTEM, INC., INTERVENOR

September Term, 1971

Before WRIGHT, MCGOWAN, and ROBINSON, Circuit Judges

ORDER

On consideration of the petitions for rehearing filed by Post-Newsweek Stations, Capital Area, Inc., American Broadcasting Companies, Inc., the United States of America and Federal Communications Com-

mission, and Columbia Broadcasting System, Inc. for rehearing, and of the brief of *amicus curiae* National Broadcasting Company, Inc. in support of the petitions for rehearing, it is

Ordered by the Court that the aforesaid petitions for rehearing are denied.

Per Curiam.

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E. ROBERT SEAVER, CLERK

Supreme Court of the United States

OCTOBER TERM, 1971

71-865

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
Petitioner,

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1971

No.

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
Petitioner,

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on August 3, 1971.[1]

[1]The Court of Appeals considered in a single opinion both this case (No. 24,492 below) and a companion case (No. 24,537 below). Petitioner was a party in No. 24,492 and this petition is directed to that case.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet officially reported, appears as Appendix A of the petition of the Federal Communications Commission and the United States.[2] The opinion of the Commission is reported at 25 F.C.C. 2d 242 and appears as Appendix C of the FCC's petition.

JURISDICTION

The judgment of the Court of Appeals was entered on August 3, 1971 and appears as Appendix D of the FCC's petition. A timely petition for rehearing was denied by the Court of Appeals on October 4, 1971 by an order which appears as Appendix E of the FCC's petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the First Amendment requires a radio station, which has provided full and fair coverage of the diverse viewpoints on a controversial public issue, to sell on demand broadcast advertising time to a private individual or a group for brief "spot" announcements asserting that individual or group's views on the same issue.

STATUTE INVOLVED

Sections 3(h) and 315(a) of the Communications Act of 1934, 47 U.S.C. §§153(h), 315(a), appear at page 3 of the FCC's petition.

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[2]The FCC and the United States have petitioned for certiorari to review the same decision involved in this petition. Their petition will be cited as "FCC Pet." References to the joint appendix in the Court of Appeals, a copy of which is being lodged with the Clerk of this Court, will be cited as "J.A."

STATEMENT

This case concerns a newly asserted First Amendment "right" to compel a radio station, which is presently providing full and fair coverage of a controversial public issue, to sell "spot" advertising time to private parties to assert their views on the same issue. This constitutional claim, accepted by a divided Court of Appeals over the opposition of the agency charged with administering the Communications Act, has far-reaching consequences for the balance of broadcast programming in this country and for the legal regime within which the broadcasting industry operates.

In June 1969 and twice thereafter, the respondent organization, Business Executives' Move for Vietnam Peace ("BEM"), sought to purchase advertising time on radio station WTOP, operated in the District of Columbia area by the petitioner Post-Newsweek Stations, Capitol Area, Inc. ("WTOP") (J.A. 84). BEM's purpose was to present a series of sixty-second "spot" announcements, samples of which appear in the record, conveying its opposition to the Vietnam war (J.A. 8).

By express provision of the Communications Act of 1934 ("the Act"), WTOP like all other broadcasters is not a "common carrier," obligated to carry any message or program proffered to it.[3] At the same time, the Commission has administered the Act to require broadcasters such as WTOP to devote reasonable time to presenting a fair spectrum of views on controversial public issues.[4] WTOP has,

[3]Section 3(h) of the Act, 47 U.S.C. §153(h), expressly provides *inter alia* that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

[4]The requirement that a broadcaster, in its overall treatment of a controversial public issue, give a fair presentation of the range of diverse views is embodied in the FCC's "fairness doctrine." See *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598 (1964) (*"Fairness Primer"*). The doctrine is premised on the Act's "public interest" standard governing broadcasting licensing (*e.g.*, Section 309, 47 U.S.C. §309),

as the record shows (J.A. 86-87), provided such full and fair coverage of the range of diverse views about the Vietnam war including the views asserted in BEM's proposed "spot" announcements. See pp. 5-6, *infra.*

WTOP declined to sell BEM the "spot" announcement time requested because of its longstanding general policy not to sell "spot" announcement time for editorial advertisements on controversial public issues (J.A. 7). As WTOP explained to the Commission, it currently broadcasts diverse views of interested spokesmen on different sides of public issues through a wide range of commentaries, interviews, news reports and other presentations (J.A. 18-19). WTOP's policy is neither required nor forbidden by the Commission, and BEM did in fact purchase "spot" advertising time for its Vietnam war messages on several other stations in the Washington, D. C., area (J.A. 28-29).

In January 1970, BEM filed a complaint with the Commission requesting that WTOP be required to furnish it free time for its "spot" announcements or, in the alternative, to sell it that time. BEM's central claim was that WTOP's coverage of the Vietnam war did not adequately portray the range of views among opponents of Government policy on the war in accordance with the Commission's fairness doctrine (J.A. 3-4). Among other contentions, BEM also complained that WTOP's refusal violated the public's "right to hear" and that WTOP was obligated by the First Amendment to carry BEM's announcements (J.A. 5-6).

BEM did not assert before the Commission any facts that supported its charge under the fairness doctrine that WTOP had failed to present full and fair coverage of the Vietnam war. Despite the absence of *any* such evidence, WTOP affirmatively showed that it had provided full and

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and has received Congressional approval in Section 315(a), 47 U.S.C. §315(a), which speaks of "the obligation imposed upon . . . [broadcasters] under this [Act] . . . to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

fair coverage of the war, including news reports of statements by officials of the Government and by its critics, coverage of press conferences and meetings of various groups advancing different positions about the war, and broadcasts carrying the views of leading Congressional spokesmen and WTOP's own regular commentators reflecting widely differing views about the war.[5]

BEM also made no factual showing that its views would not reach the listening public unless WTOP were required to furnish it the broadcast time in question. WTOP's executive editor responsible for news and informational programming stated that the very views embodied in the BEM "spot" announcements were of his own knowledge "expressed on a number of occasions in various types of broadcasts over WTOP . . . " (J.A. 46). The record also indicated that other Washington, D. C., area stations did carry BEM's "spot" announcements (J.A. 28-29).

In its decision released in April 1970, the Commission found no basis for concluding that the fairness doctrine had been violated.[6] It noted that the "multiplicity of spokesmen available" to express views on the war made it obvious that a broadcaster must exercise its judgment in selecting spokesmen "to insure an orderly and effective presentation of the many conflicting views" (J.A. 86-87). In light of WTOP's uncontroverted evidence of the diversity of its

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[5]Among other examples, WTOP pointed to its coverage of press conferences, meetings, rallies and demonstrations including those of such anti-war groups as the Vietnam Moratorium Committee and the New Mobilization Committee to End the War in Vietnam and such pro-Administration groups as Americans for Peace with Freedom and Young Americans for Freedom (J.A. 16). WTOP also cited, among other Congressional spokesmen who had appeared on the station, Senators McGovern, Gore, Goodell, Mansfield, Percy, Goldwater, Tower and Scott and Representatives McCormick and Ford. *Id.*

[6]The vote in the Commission was six to one, Commissioner Johnson filing a lengthy dissent. The dissent, however, was addressed solely to constitutional issues and did not question WTOP's compliance with the fairness doctrine (J.A. 91).

coverage of the war, the Commission concluded in substance that WTOP had exercised a good faith and reasonable judgment in its coverage and complied with the requirements of the fairness doctrine (J.A. 87).

The Commission, with Commissioner Johnson dissenting, rejected BEM's claim that it had an absolute constitutional right to require WTOP to sell it time for its "spot" announcements despite WTOP's full and fair coverage of conflicting views on the war, including BEM's own views. The FCC decision pointed out that this Court's opinion in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), had described the broadcaster's undertaking as one "to present *representative* community views on controversial issues . . . " (J.A. 89).[7] The Commission also observed that, within the limits of the fairness doctrine, the Act had imposed upon the broadcaster the obligation to exercise his judgment in selecting program matter, format, and the individuals who appeared on the station, so that the relief sought by BEM was flatly at odds with the Congressional plan for broadcasting (J.A. 90).

BEM sought review of the Commission's decision in the Court of Appeals for the District of Columbia Circuit which, by a two-to-one vote, reversed the decision of the agency.[8] The lower court held that, regardless of Congressional or agency policy, the First Amendment made it unconstitutional for WTOP to decline to sell "spot" advertising time for editorial advertising such as BEM sought to present, and the opinion deemed WTOP's policy to constitute "state action" for this purpose although it was neither required nor

[7] In *Red Lion*, this Court upheld the FCC's "personal attack" and "candidate endorsement" regulations, the two applications of the fairness doctrine that have been codified in regulation form. More broadly, the Court rejected both statutory and constitutional claims directed against the fairness doctrine on a variety of grounds.

[8] Jurisdiction of the Court of Appeals rested upon Section 402(a) of the Act, 47 U.S.C. §402(a), and upon 28 U.S.C. §2342. WTOP was permitted to intervene in the review proceeding in support of the Commission's decision. 28 U.S.C. §2348.

instigated by the Commission (FCC Pet. 10a-11a, 42a-43a). The court did not question the record evidence showing that WTOP had presented a full and fair range of views about the war including the views of BEM; it declined to say whether its holding would apply to a station which broadcast no advertising whatever (FCC Pet. 3a, 36a).

In dissent, Judge McGowan indicated that the Court's decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), had made it clear that there is no absolute First Amendment right of particular individuals or groups to broadcast, and he observed that Congress' reliance on private licensees, constrained to fair presentation of controversial views under the fairness doctrine, has generally been effective in implementing "the public's right to know" (FCC Pet. 45a-46a). He questioned the wisdom of adopting a regime "in which money alone determines what issues are to be aired" and concluded that, in any event, the First Amendment did not require that result (FCC Pet. 46a-47a).

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURT HAS DETERMINED A MAJOR CONSTITUTIONAL QUESTION WHICH SHOULD BE RESOLVED BY THIS COURT.

The opinion below has in substance created a new First Amendment "right" of private individuals and groups which, if allowed to stand, is certain to have a substantial impact upon broadcasting in this country and the regulatory regime established by Congress. The opinion below, in declaring that the Constitution compels a broadcaster to sell time for editorial "spot" advertising on issues already fully and fairly covered by the station, has no precedent in the decisions of this or any other court.[9]

[9]The only decision located concerning a claimed First Amendment "right" to broadcast time squarely rejected such a claim, observing that freedom of speech "does not mean . . . that . . . [an individual] may

The importance of the constitutional issues presented and their unprecedented resolution by the lower court themselves justify review here under the standards for certiorari followed by this Court. The significance of the decision is especially great because, unlike decisions such as *Red Lion*,[10] it does not hold that a plan deemed wise by Congress or the agency is *permitted* by the First Amendment; instead, it holds that the Constitution *compels* a particular approach, whatever Congress or the agency may deem to be sound policy. The dissenting opinion below aptly described the decision in this respect as establishing "a constitutional straitjacket" (FCC Pet. 47a).

The decision below is additionally deserving of review because it is based upon a misconstruction of the decisions of this Court dealing with the relationship of broadcasting and the First Amendment. From its opinion in *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943), to the present, the Court has remarked that "unlike other modes of expression, radio inherently is not available to all. . . . Because it cannot be used by all, some who wish

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seize a particular radio station for his forum." *McIntire v. Wm. Penn Broadcasting Co.*, 151 F. 2d 597, 600 (3rd Cir. 1945), *cert. denied*, 327 U.S. 779 (1946). Lower court decisions have on occasion enforced First Amendment claims in relation to other media, for example by requiring a municipal transit system to accept protest advertising. *E.g., Zucker v. Panitz*, 299 F.Supp. 102 (S.D.N.Y. 1969). Such cases do not, however, involve media with the special characteristics of broadcasting including the regulatory regime requiring broadcasters to give full and fair coverage to diverse views on issues of public importance. It should also be noted that predominantly such cases involve city or state premises or enterprises rather than, as here, privately operated facilities.

[10]That decision was accurately described by the lower court as "perhaps the most important recent development" among cases here relevant (FCC Pet. 11a) but, as demonstrated below, its own opinion in this case cannot be squared with *Red Lion*. Cf. Sup. Ct. R. 19(1)(b).

to use it must be denied." It follows, as this Court emphasized in *Red Lion*, that "it is idle to posit an unabridgeable First Amendment right to broadcast" inhering in private parties. 395 U.S. at 388.

As *Red Lion* makes plain beyond peradventure, private interests are subordinate to the paramount public interest in sound utilization of the resource including full and fair presentation of "representative community views" on public issues. 395 U.S. at 394. Other citations and statements in that opinion confirm that, at least in the confines of broadcasting, emphasis must be upon public "access to . . . ideas" rather than access of particular individuals to that form of self-expression. 395 U.S. at 390. In the words of a distinguished commentator on the First Amendment, "What is essential is not that everyone shall speak, but that everything worth saying shall be said."[11]

The lower court's decision stands *Red Lion* on its head. It ignores the unimpeached evidence that WTOP has presented "representative" views on the war including the very views BEM wished to broadcast, and sanctions BEM's claim to arrogate scarce broadcast time to repeat those same views without regard to the full and fair coverage of the issues already available to the public. The decision below thus cannot be squared with the very conception of First Amendment interests in broadcasting which this Court has recently reaffirmed.[12]

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[11] A. Meiklejohn, *Political Freedom* 25-28 (1948). See also II Z. Chafee, *Government and Mass Communications* 624-50 (1947); *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1249 (1949).

[12] Although the lower court's decision is expressly premised upon the First Amendment, it resorts to equal protection principles in relying to some degree upon WTOP's provision of "spot" advertising time for commercial advertising. There is no invidious discrimination, however, in a policy which reasonably distinguishes between commercial and public-issue subjects by presenting the latter, not in paid-for sixty second commercials, but in news broadcasts, public affairs interviews, and a variety of other types of programming normally at the station's expense. The majority opinion suggests that more than a "reasonable"

The result reached by the lower court affirmatively disserves the very First Amendment interests on which the opinion below relies. While this is not the place for a full-scale discussion of the merits of the decision, it is relevant here that the decision threatens to disrupt the balanced presentation of controversial public issues over the airwaves by giving undue weight to those who can pay handsomely for advertising time. This conversion of the public airwaves into a forum for partisan propaganda is the most concrete consequence likely to follow from the decision, although it is not the only threat the decision poses to free-speech interests in broadcasting.

Even the Court of Appeals' majority recognized that a legitimate serious argument against its new regime is the possibility that the cost of broadcast advertising time might lead to domination of editorial advertising by "one part of the political spectrum" (FCC Pet. 40a). This risk can not be dismissed as chimerical at a time when the high price and great influence of political advertising on radio and television has become a recognized fact of life and is even now inspiring proposals designed, not to facilitate the influence of money in the political process, but to blunt its impact. See H. Rep. No. 92-752, 92nd Cong., 1st Sess. 3 (1971). The lower court's bland assertion that this danger can be met by increased Commission regulation is not persuasive in view of the regulatory and financial problems involved (see pp. 17-18, *infra*), and such increased regulation presents First Amendment problems of its own which deserve at least brief comment.

The court below expressly contemplates that in light of its decision the FCC will have to assert increased supervision over programming decisions, through "guidelines" (FCC Pet. 41a), although it too blandly passes over the scope and the difficulty of devising a workable regime. Among other

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distinction is necessary where First Amendment interests are at stake (FCC Pet. 36a); but those interests weigh at least as heavily in *favor* of the station's policy because that policy operates to secure a more thorough and balanced presentation of the issues. See pp. 10, 16, *infra*.

intractable problems involved would be those of defining the types, length and number of editorial advertisements that would have to be carried; establishing priorities among editorial advertisers for the limited time available; delineating the measure of broadcaster control retained over the format and content of the advertisements; and determining the broadcaster's financial responsibility for providing time to reply.

This range of regulation even if feasible would involve the Commission to an unprecedented degree in broadcaster programming decisions. In addition to formulating initial "guidelines," the Commission would be forced to play a continuing role as referee in disagreements between the stations and editorial advertisers over particular advertisements, their formats and their contents. This pervading intervention is precisely what Congress—aware that "the line between regulation and censorship is a thin one" (H. Rep. No. 91-257, 91st Cong., 1st Sess. 3 (1969))—has long sought to avoid, and it would present serious dangers of its own to vigorous and independent broadcasting.

II. THE DECISION BELOW IS IN DIRECT CONFLICT WITH DECISIONS OF THE COURTS OF APPEALS FOR THE FIRST AND THIRD CIRCUITS.

The court below recognized that the First Amendment applies to governmental and not to private action but it determined that for present purposes the action of WTOP was "state action." This determination, an explicit and necessary link in the lower court's analysis (FCC Pet. 10a-19a), ignores the deliberate Congressional decision in the Act to separate broadcasters from the Federal Government, and the determination squarely conflicts with holdings in the First and Third Circuits.

In designing a legislative structure for broadcasting, Congress chose a regime in which the primary responsibility for operational decisions is centered not in the Federal Government, but instead is possessed by private enti-

ties who are, so far as possible, free of direct interference by the Commission. For most purposes, the Act maintains a discernible distance between the broadcaster and the state: within the broad confines of the public interest standard, programming decisions are entrusted to the licensee (see pp. 15-17, *infra*) and the close supervision often imposed on the operations of public utilities and common carriers is not applied to broadcasting under the Act.[13]

Given the public interest in preserving a range of voices and views in broadcasting, the Congressional choice reflects the very interests embedded in the First Amendment. In any case, as Judge McGowan declared in his dissent below, "This is the system which Congress has, wisely or not, provided as the alternative to public ownership and operation" of broadcasting facilities (FCC Pet. 46a). On its face, this is not a regime in which the actions of licensees are coincident with "state action."

The Courts of Appeals for the First and Third Circuits have each expressly held—in rejecting claims of private individuals to "seize the mike"—that a broadcaster in declining such requests is not engaged in "state action" within the meaning of the First Amendment. In *McIntire v. Wm. Penn Broadcasting Co.*, 151 F.2d 597, 601 (3rd Cir. 1945), *cert. denied*, 327 U.S. 779 (1946), the court expressly rejected a contention that the licensee should be deemed "an instrumentality of the federal government" for constitutional purposes, noting that this was not the relationship created by Congress. In *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950), the First Circuit adopted the same view.

[13] *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). As another court long ago stated, a broadcast licensee does not have the privileges of a regulated utility (*e.g.*, monopoly of service in its area so far as it can provide such service) and, equally, is not subject to the regulation of its rates or its profits as are public utilities. Nor does a broadcaster accept all comers as does a utility or common carrier but instead, subject to the general public interest standard, "the licensee of a radio station chooses its own advertisers and its own program . . . ." *Pulitzer Pub. Co. v. FCC*, 94 F.2d 249, 251 (D.C. Cir. 1937).

The lower court did not question the existence of a direct conflict between the two decisions just cited and its own "state action" holding. In fact, the opinion below cited both cases, rejecting their conclusions as representing a "crabbed judicial view" and "doctrinal impedimenta" (FCC Pet. 11a). A more explicit conflict would be very difficult to conceive, and this outright disagreement between the circuits on a significant issue is an independent basis for the granting of certiorari by this Court. Sup. Ct. R. 19(1)(b).

Certiorari is made more appropriate because, in rejecting the position of the First and Third Circuits and determining that WTOP's programming decisions constitute "state action," the lower court relied principally upon the *Red Lion* decision (FCC Pet. 11a-13a). *Red Lion*, however, involved the lawfulness of particular administrative controls on broadcasters claimed to be authorized under the regulatory statute, and the Court had no occasion to consider and did not pass upon any "state action" question. Without here attempting a full canvass of the decisions of this Court which are in fact pertinent to that question, it is safe to say that none cited by the lower court controls the question whether broadcaster programming decisions constitute such "state action."[14]

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[14]The leading decisions of this Court extending the "state action" concept to protect First Amendment rights from infringement by nominally private persons and entities have involved locations or functions that are usually and intrinsically identified with the state. *E.g.*, *Marsh v. Alabama*, 326 U.S. 501 (1946) (company town); *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) (thoroughfare). Broadcasting in this country is patently not a governmental preserve or function, nor is the lower court persuasive in seeking to apply the "state action" label to broadcasting by extracting general language from cases decided in the quite different context of racial discrimination. It should be repeated, however, that WTOP does not believe its policy on editorial "spot" advertisements violates the First Amendment however the "state action" question may be resolved. See pp. 7-11, *supra*.

The uniqueness of the lower court's "state action" holding is highlighted by considering the precise ruling of the Commission in this case. There was no statutory provision constraining WTOP to follow its policy against the sale of "spot" time for editorial advertising and the Commission's decision neither required nor affirmatively approved that policy. Compare *Public Utilities Commission v. Pollak*, 343 U.S. 451, 462 (1952). Any broadcaster is free under the Act and opinion of the Commission here to sell "spot" advertising time if it believes this course is wise and, indeed, some broadcasters do sell such time. See p. 4, *supra*. In short, WTOP's programming decision was taken on its own initiative and based on its own judgment of the competing factors; the Federal Government has remained entirely neutral; and in every realistic sense the action taken constitutes private rather than state action.

The arms-length relationship that Congress long ago established between broadcasting and the Federal Government has, as the dissenting judge below observed, "never been thought to be other than within the permissible limits of constitutional choice" (FCC Pet. 46a). As the First and Third Circuits recognized, that relationship is not compatible with a finding that private-licensee decisions constitute "state action." Before a drastic revision is made in this pattern created by statute and acknowledged in judicial decision, plenary review by this Court is fully warranted.

III. THE ISSUES PRESENTED ARE OF CENTRAL IMPORTANCE TO THE ADMINISTRATION OF THE COMMUNICATIONS ACT.

As the Act has been administered for over forty years, it has been a cardinal principle of broadcasting operations that the licensee has the ultimate responsibility for selecting the program material carried on its frequency.[15] The decision below explicitly impairs that principle and the significant consequences which follow for the broadcast industry, for the public and for the Commission's administration of the Act furnish a final reason why certiorari should be granted.

It is not disputable that, at least with respect to editorial advertising, the decision below drastically revises both the Commission's longstanding policy of reliance upon the "good faith exercise of . . . [the licensee's] best judgment" in selecting material, formats and spokesmen and the Commission's position that "no single group or person is entitled as a matter of right" to preempt time to express his personal views on public issues. *Fairness Primer*, 40 F.C.C. 598, 609 (1964). The majority's opinion directly curtails the right of broadcasters to reject editorial advertising as

[15] See, *e.g.*, *Pulitzer Pub. Co. v. FCC*, 94 F.2d 249 (D.C. Cir. 1937), quoted p. 12, n. 13, *supra*. This precept has been repeatedly emphasized by the Commission in its general statements (*e.g.*, *Fairness Primer*, 40 F.C.C. 598, 608-09 (1964)) and in its individual rulings. *E.g.*, *Mrs. Madalyn Murray*, 40 F.C.C. 647 (1964). In narrowly defined instances, Congress (in Section 315(a), 47 U.S.C. § 315(a)), and the Commission (in the "personal attack" and "candidate endorsement" regulations upheld in *Red Lion*) have mandated a qualified right of reply by political candidates, their supporters, and individuals subject to personal attacks; in each instance, however, the licensee took responsibility by countenancing the broadcast which gave rise to the reply. Section 315(a), while requiring equal time for opponents of a qualified candidate to reply to him, expressly states that "no obligation is imposed upon any licensee to allow the use of its station by any such candidate."

such. Accordingly, it states that the licensee may not exercise "the same 'authoritative selection' in editorial advertising which he exercises in normal programming" (FCC Pet. 41a).

The decision consequently relates to a matter of continuing importance to broadcasters across the country since program decisions must be made by all of them virtually on a daily basis. Certainly once the door is forcibly opened to the countless private factions, lobbies and pressure groups, it is only realistic to expect that the demands for editorial advertising time will be numerous and widespread.[16] While the opinion below leaves open numerous questions, including its possible extension beyond "spot" advertising to longer programs, these questions merely serve to extend and dramatize its prospective impact on broadcasting.

Any inroads on the broadcaster's ultimate responsibility to determine his programming affects not only the particular material he must broadcast, contrary to his best judgment, but in addition much other programming he may carry. Any substantial change in one area of programming–for example, a concentrated series of "spot" announcements advocating a position on the Vietnam war–may require the broadcaster who seeks to maintain a balanced presentation to make still other changes. This could easily entail substituting a program taking a contrary view on war policy for one previously planned on a quite different but equally important subject, even though diverse views on the war have been repeatedly portrayed and the other subject well might badly warrant exposure.

The ramifications of the decision below affect not only what the licensee broadcasts but also its responsibilities with

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[16]See, *e.g.*, letter to The Committee of One Million, FCC 71-1096, Oct. 22, 1971, concerning a demand to purchase time for "a one hour documentary film entitled, 'U. S. China Policy: Danger at the Crossroads' "; letter to Communication Workers of America, FCC 71-832, Aug. 6, 1971, concerning a demand to purchase time for messages to the union members on "contract ratification."

respect to its broadcasts. At present, because a broadcaster can control the content of its programs, its overall performance can properly be judged in light of the public interest standard when it seeks renewal of its license. For the same reason, a station can be required under the fairness doctrine to supply time for and, if necessary, to subsidize programs needed for balanced presentations on public issues, and it can be held liable in suits by injured parties for defamatory statements it may allow to be transmitted.[17] Serious problems are thus presented whether the licensee continues to be responsible with curtailed power to fulfill his responsibilities, or whether the responsibility itself is proportionately limited.

An apt illustration is provided by the lower court's assumption that to redress any one-sided presentation sanctioned by its decision, the Commission could simply apply the principle of *Cullman Broadcasting Co.*, 40 F.C.C. 576, (1963), to require "advertisements on the other side of the issue, free of charge if necessary" (FCC Pet. 41a). *Cullman*, however, rests on the premise that "where the licensee has *chosen* to broadcast a sponsored program" presenting one side of an issue, it is then its responsibility to present the other side even if it must bear the cost itself. 40 F.C.C. at 577 (emphasis added). It is far from clear that *Cullman* could or should be followed where the licensee has not chosen to present the original broadcast but has, on the contrary, been compelled to do so. See *Farmers Union v. WDAY*, 360 U.S. 525 (1959).

Even if *Cullman* could properly be extended to broadcasts imposed on the licensee under the lower court's decision, the extent of the financial burden upon the broad-

[17]The link between the broadcaster's control of program content and his liability for it was emphasized by this Court in *Farmers Union v. WDAY*, 360 U.S. 525 (1959). That case held that a broadcaster, although normally responsible for defamatory statements transmitted from its station, could not be sued for such an utterance made by one exercising his statutory right to equal time for political candidates under Section 315(a), 47 U.S.C. §315(a).

caster could well be unsupportable.[18] Moreover, the resulting profusion of editorial advertisements would at best be a very questionable contribution to the best uses of scarce spectrum space. Consequently, extension of *Cullman* is neither a sure nor an adequate remedy to redress the imbalance in treatment of public issues, and the increased influence of wealth in forming public opinion, that the lower court's decision seems certain to produce.

The problems illustrated by *Cullman* extend to other areas of broadcaster responsibility, such as license renewal proceedings and suits for defamation. The interests involved are not simply the private interests of broadcasters but relate directly to the programming available to the public and, indeed, to the political process itself. It is thus in the interest of the public as well as the industry that the decision below be subject to review at the earliest possible opportunity.

Immediate review is especially appropriate because of the impact the decision will have on the regulatory process. If the decision is not now reviewed, the Commission and the industry will become increasingly embroiled in the intractable administrative problems which are a necessary consequence of the lower court's decision (see p. 11, *supra*). Before the time and effort of the agency and licensees are diverted away from improved broadcasting and into an imbroglio that may take years to resolve, plenary review in this Court is surely appropriate.

In point of fact, the Commission has recently undertaken to appraise afresh the operation of the fairness doctrine and to consider new proposals to improve its operation. *Study of Fairness Doctrine*, 30 F.C.C.2d 26 (1971). At the same time, the Commission has recognized that any conclusions it may reach or improvements it may attempt depend sig-

[18] According to the latest FCC report, 32 percent of the AM stations and 69 percent of the independent FM stations in this country suffered net losses in 1969. *AM, FM Broadcast Financial Data–1969*, released December 14, 1970.

nificantly on the outcome of cases such as this one. 30 F.C.C.2d at 27, 33. Plainly, this important inquiry cannot be successfully concluded until there is a definitive determination in this Court of the central legal issues presented by the lower court's opinion.

In sum, even if the issues in this case did not rise to a constitutional level or involve a direct conflict among circuits, it would be appropriate for plenary review because of the broad potential impact upon broadcasting and the regulatory process. As this Court said in *Farmers Union v. WDAY*, 360 U.S. 525, 527 (1959), certiorari is warranted "because the questions decided are important to the administration of the Federal Communications Act."

CONCLUSION

For the reasons stated above, the petition for a writ certiorari should be granted.

Respectfully submitted,

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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

AMERICAN BROADCASTING COMPANIES, INC.,
Petitioner,

v.

DEMOCRATIC NATIONAL COMMITTEE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

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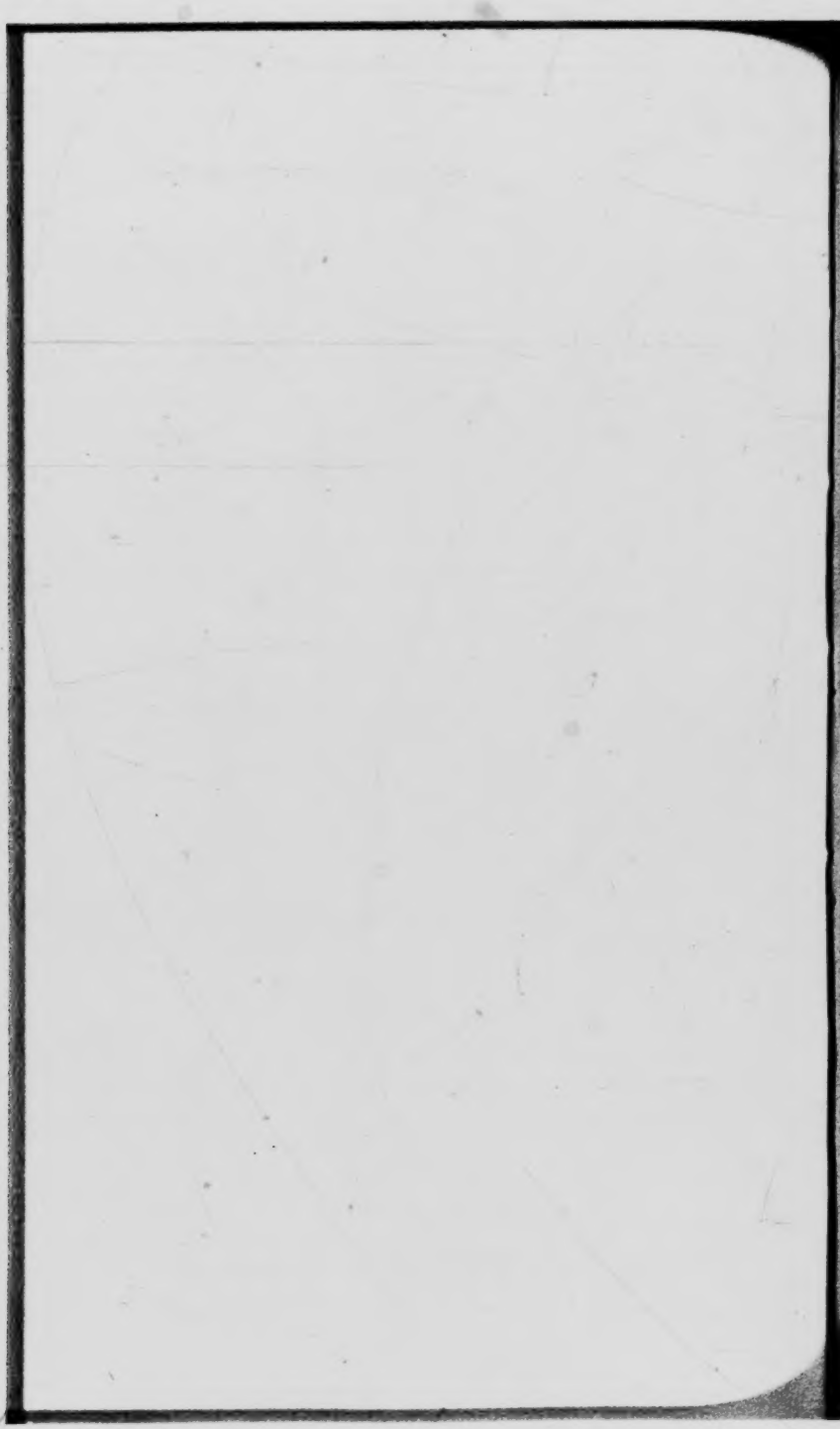

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ———

AMERICAN BROADCASTING COMPANIES, INC.,
Petitioner,

v.

DEMOCRATIC NATIONAL COMMITTEE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

American Broadcasting Companies, Inc. (hereinafter "ABC"), hereby petitions this Court for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review that court's judgment of August 3, 1971, in *Business Executives' Move for Vietnam Peace* v. *FCC*, No. 24,492, and *Democratic National Committee* v. *FCC*, No. 24,537, two separate cases decided in a single opinion. ABC intervened in support of the Federal Communications Commission and United States of America in the *Democratic National Committee* case, and participated as a party before the Commission and the Court of Appeals.

The United States, the Federal Communications Commission, Post-Newsweek Stations, Capital Area, Inc. (Intervenor in No. 24,492) and Columbia Broadcasting System, Inc. (Intervenor in No. 24,537) are also petitioning for certiorari to review the Court of Appeals decision.

FCC v. *Business Executives' Move for Vietnam Peace*, filed January 3, 1972; *Post-Newsweek Stations, Capital Area, Inc.* v. *Business Executives' Move for Vietnam Peace*, filed January 3, 1972; *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, filed January 3, 1972.

OPINION BELOW

The Court of Appeals' opinion, attached hereto as Appendix A, has not yet been officially reported. The decision of the Federal Communications Commission, attached hereto as Appendix D, is reported at 25 F.C.C.2d 216 (1970).

JURISDICTION

The judgment of the Court of Appeals, attached hereto as Appendix B, was entered on August 3, 1971. Timely petitions for rehearing were denied by an order of the Court of Appeals, attached hereto as Appendix C, entered October 4, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the First Amendment to the Constitution requires the Federal Communications Commission to establish a regulatory system under which broadcast licensees, presently required to provide full and fair coverage of diverse viewpoints on controversial public issues, must also permit the purchase by individuals or groups of "spot" announcements to present the views of those individuals or groups on such issues.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves the First Amendment to the United States Constitution, and Sections 3(h), 315 and 326 of

the Communications Act of 1934, as amended, 47 U.S.C. §§ 153(h), 315 and 326. These constitutional and statutory provisions are set forth in Appendix E to this petition.

STATEMENT

I. *Agency Proceedings.* Petitioner American Broadcasting Companies, Inc., itself or through its subsidiaries, is the licensee of a number of radio and television stations and operates radio and television networks.

This case originates with a request by the Democratic National Committee (hereinafter "DNC") that the Federal Communications Commission (hereinafter "FCC" or "Commission") issue a declaratory ruling that, as a general matter, broadcast licensees are required to sell broadcast time to "responsible entities, such as DNC, for the solicitation of funds and for comment on public issues." (App. D, D1.)[1] Framed in this fashion, the DNC petition contained no assertions that any particular broadcast licensee either had failed to provide full and fair coverage of important public issues or had refused to sell time for comment on controversial public issues. Indeed, the request contemplated that notwithstanding such coverage or any individual offers of paid time for controversial issue comment, a general obligation remained as to all broadcasters to sell time to DNC and similar groups to present their viewpoints.[2]

Since the declaratory ruling request made reference to their operational policies, the Commission solicited comment on the proposal from the three national television networks. In response, ABC set forth a number of in-

[1] Citations to appendices to this petition will appear "App. —, —".

[2] The DNC had explained that its request was largely prompted by the need of political parties, particularly its own, to achieve a broader financial base—an accomplishment that could be more readily assured by guaranteed access to the broadcast media for fund raising announcements. (App. D, D2-D3).

ternal policy standards which, *inter alia*, recognize an abiding responsibility to utilize its broadcast facilities in a manner which safeguards and promotes opportunity for the full exposure of representative views on controversial issues of general concern to the American people. At the same time, recognizing the public interest detriments of, and practical impediments to, a universal and absolute right by any "responsible entity" to purchase time to espouse a point of view or to solicit funds, ABC advised the Commission that it proposed to continue a general policy against the sale of time for controversial issue programs and announcements and solicitations for funds, absent special public interest considerations. However, ABC further indicated that it was prepared to accept such orders for time from major political parties as could reasonably be accommodated. (App. D, D5.)

In its decision, the Commission held that broadcasters must make time available "to significant political parties for the solicitation of funds," but that—relevant to the ensuing judicial review—important statutory and policy considerations militated against granting DNC or any other particular individual or group an absolute right of access to broadcast time for the purpose of commenting on controversial issues of public importance.[3]

The Commission emphasized that although there are no policy restraints that would preclude a licensee—consistent with his fairness doctrine responsibilities—from selling time for controversial issue discussion, more compelling considerations motivated the Commission's refusal to hold that a licensee is unyieldingly bound to sell time for the presentation of particular persons or groups. A guiding theme underlying this holding was the Commis-

[3] In a separate action announced on the same day, the Commission similarly rejected the complaint of an anti-war group against a Washington radio station which had refused to sell spot advertising time to present that group's views on the Vietnam War. *Business Executives' Move for Vietnam Peace*, 25 F.C.C. 2d 242 (1970).

sion's finding that the regulatory framework sanctioned by Congress in the Communications Act of 1934, as amended, deliberately avoided placing broadcasting in a "common carrier" mold. (App. D, D14.) Thus, in contrast to common carriage, which is public in its availability but essentially private and passive in its communication function, broadcasting exists to communicate to the public at large.

As the Commission observed, this was the very role endorsed by this Court in its *Red Lion* decision [4]—a role which contemplates that broadcast licensees will perform in a "fiduciary" capacity for the entire public they serve. In this context, the Commission noted that in *Red Lion*, this Court had characterized the broadcaster's task as being oriented to the presentation of "representative community views on controversial issues." This undertaking does not, however, comprehend the further dimension embodied in DNC petition, that there is an obligation to sell time for the presentation of individual views over and beyond the fairness doctrine right of the public to be informed. (App. D, D16.) As the Commission remarked, a determination of this sort would entail a substantial reordering of the fairness doctrine and a direct assault upon the touchstone of broadcast regulation—i.e., the concept set in motion by Congress, and more recently sustained by this Court in *Red Lion*, that the public interest obligation of broadcasters is to devote a reasonable amount of time to issues of public importance and to do so in a fair manner. On this basis, the Commission ultimately concluded that the present system of regarding licensees as "trustees", with an affirmative duty to present contrasting viewpoints through representative spokesmen, was of greater public benefit than—and could not reasonably coexist with—a regulatory standard based on an individualized right of access. (App. D, D22.)

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[4] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

II. *The Opinion Below.* Upon petitions for review under Section 402(a) of the Commuincations Act of 1934, 66 Stat. 718, as amended, 47 U.S.C. § 402(a), the United States Court of Appeals for the District of Columbia Circuit, in a consolidated opinion comprehending the *Business Executives* case as well,[5] reversed the separate decisions of the Commission. The lower court, by a two-to-one vote, held that broadcast licensees who sell time for spot advertisements for commercial products and services are obligated by the First Amendment to make such advertising time available to individuals and groups wishing to present their particular views on controversial issue subject matter. Under the majority opinion, the newly articulated constitutional right to purchase spot announcements for public issue discussion would obtain regardless of whether the licensee in question was in full compliance with the Commission's fairness doctrine. Indeed, the right could be invoked even in circumstances where the issue and precise viewpoint the individual or organization seeks to address has been specifically covered in prior broadcasts. (App. A, A25.)

The court was unpersuaded by the contentions of the Commission and broadcasters that the public's agenda for public issue discussion would increasingly be determined by those persons or groups having the financial wherewithal to purchase media access; that, in the process, licensees would face diminished control over their program content and schedules; and that the associated fairness doctrine principle that contrasting views be presented free of charge if sponsorship is unavailable could, if applied to this form of editorial announcement, impair the broadcast industry's financial base. In this regard, the court below simply remanded the cases to the Commission for the purpose of developing "reasonable regulatory guidelines" to somehow accommodate these and other factors. (App. A, A40-A41.)

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[5] See note 3, *supra*.

Judge McGowan, in dissent, characterized the Commission's task as one of "heroic proportions," the complexity of which might undermine the basic premise on which it was founded. He was further unconvinced that the Constitution required that such a task be undertaken. (App. A, A42.) In Judge McGowan's view, the newly established First Amendment right announced by the court could interfere with and frustrate the right—so essential to this Court's prior ruling in *Red Lion*—of the public to be fully informed. The private licensee system of broadcasting provided by Congress, operating under "an obligation . . . to advance the public's right to know by devoting a substantial amount of time to the presentation of controversial issues of public importance," has proven to be an effective mechanism for implementing the desired public policy. (App. A, A43.) To now disgard this regulatory scheme for "a new system in which money alone determines what issues are to be aired" would, Judge McGowan concluded, represent an unwise and unnecessary course. (App. A, A43.)

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Has Decided an Important Constitutional Question Which Should Be Resolved by This Court

The decision below establishes a constitutional right relating to the broadcast field heretofore unarticulated and unacknowledged, either by the Congress, by the Federal Communications Commission or by the courts. Reading this Court's decision in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) to be a "clarion call for a new public concern and activism regarding the broadcast media" (App. A, A11), the majority panel below has ruled that private individuals and groups have a First Amendment entitlement to purchase spot announcements on broadcast stations for the purpose of presenting their views on controversial issues of public importance. While

initially asserting the issue before it to be a "relatively narrow" one (App. A, A4), even the lower court ultimately acknowledged its decision to be a most dramatic and far-reaching one.[6] And indeed, the decision represents at once a misconstruction of this Court's prior decisions dealing with the relationship of broadcasting and the First Amendment, an inconsistency with the Congressional design of the broadcaster-federal government relationship, and a potentially drastic disruption of the regulatory scheme which has vested in the broadcaster the basic responsibility to determine the form and content of discussions of public issues on his station.

This Court has twice made clear that, by reason of its unique nature and unlike other modes of expression, "radio inherently is not available to all. Because it cannot be used by all, some who wish to use it must be denied." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226 (1943); cf. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 388 (1969). And under the statutory structure established by Congress and administered by the FCC, it has been the broadcaster who has been charged with the responsibility of determining what entities will be granted access to his broadcast facilities. Describing the nature of the discretion thus vested in its licensees, the Commission stated in its basic *Editorializing Report* in 1949 (13 F.C.C. 1246, 1251-52):

> In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups of individuals who might be more appropriate spokesmen for the particular point of view than the person making the request . . . .

[6] See, e.g., App. A, A 14, n. 16, where the court rejected a "highly analytical—one might say mechanical—approach" to the "state action" question, choosing instead "to paint with a broader brush."

Thus it is the "right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter which is the foundation stone of the American system of broadcasting." *Id.* at 1249; see also *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969).

Yet notwithstanding this Court's emphatic delineation of the public's collective right of access to *viewpoints* in *Red Lion*, 395 U.S. at 390, the lower court has sought to drastically shift the focus of that declaration by according individuals and groups a constitutional right to spot advertising time on commercial broadcast stations. In so doing, the lower court has ignored the clear import of this Court's observation in *Red Lion* that "it is idle to posit an unabridgeable First Amendment right to broadcast" inhering in private individuals or groups. *Id.* at 388. Moreover, it has interjected a concept and structure which, if pursued, will ultimately undermine the most fundamental policy goal of enhancing the public's ability to share in a full media exposition of social, political and other ideas and experiences. *Id.* at 390.

To the extent that the lower court's ruling significantly impairs a broadcast licensee's ultimate responsibility to determine what programming he may carry, it is also directly contrary to the legislative scheme Congress has established for broadcasting. Section 3(h) of the Communications Act, for example, expressly provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(h). See *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950); *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied* 327 U.S. 779 (1946). However, the majority holding below—that broadcast licensees must sell or donate time to any and all responsible entities for the presentation of their views on controversial

issues of public importance—would effectively transform broadcast advertising time into at least a part-time "common carrier" function, in express contravention of the language of Section 3(h). Moreover, the lower court's ruling likewise flies in the face of the explicit Congressional prohibition against regulation of program content as set forth in Section 326 of the Communications Act. 47 U.S.C. § 326. For compelling a broadcaster to make time available to any responsible person or entity is as much an encroachment on free expression as the suppression of particular views. See *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 641-642 (1943); *Banzhaf* v. *FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied* 396 U.S. 842 (1969). As it was said in *Banzhaf* (*id.* at 35):

> We do not doubt that official prescription in detail or in quantity of what the press must say can be as offensive to the principle of a free press as official prohibition.

Review of the lower court's decision is further warranted in light of the substantial impact its implementation will have on the broadcast industry generally, and on the future administration of the Communications Act. As noted above, the American system of broadcasting has been founded on a recognition that the medium inherently cannot accommodate all, *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226 (1943); *Larus & Brother Co.* v. *FCC*, 447 F.2d 876, 882 (4th Cir. 1971), and a determination that broadcasters, rather than government, should perform the function of determining who must be denied. This fundamental regulatory principle has been the essential predicate for the Commission's fairness doctrine which, while requiring treatment of opposing views on controversial issues, permits licensee discretion in the selection of spokesmen and program format. Under the terms of the lower court's decision, however, that discretion is significantly diminished; broadcasters can appar-

ently no longer decide to exclusively meet their "fairness" obligations by public affairs and news programming, even though this may seem to be the more informative course. Presumably, they could treat certain controversial issues exclusively in a series of spot announcements (some paid, some free) regardless of the informative value.

The likely practical effects of the majority opinion, therefore, include weighting the initiation of public issue discussion in favor of those most able to afford the purchase of "editorial advertising," the resultant heavier involvement of the Commission in disputes over who is to have access, and the transformation of public affairs programming from an innovative, self-initiating posture to something more and more restricted as it is increasingly employed as a responsive device for spot announcements.

The majority opinion below discounted the seriousness of these consequences by asserting that it had created only a "limited" right—one which can be further circumscribed by "reasonable regulations." However, as recognized in Judge McGowan's dissent, the practical detriments to the overall public interest are not so easily avoided.

Two principal characteristics typify network and station advertising time—it is limited (especially in "prime time" when heavy demand accentuates the inherent time restriction) and it is expensive. Under the system established by the majority opinion below, a premium is automatically placed on wealth in at least initially using broadcast facilities to disseminate controversial issue advertisements. Consequently, undue encouragement is given to the exposure in this format of either (1) the *side* of a controversial issue espoused by those of greatest wealth or (2) the limited *issues* which only attract well financed competing groups. This not only produces an unwarranted discrimination against particular viewpoints and particular issues, but represents a direct impediment to the collective right of the public to receive access to

a broad range of social, political and other ideas and experiences.

A less tangible but equally pertinent impact of the system imposed by the majority decision below is that a degree of broadcaster independence in the news and public affairs area is necessarily diminished by the need to orient such programming to be responsive to the paid controversial issue announcements broadcast throughout the day, week or month. In the normal course, news and public affairs programming is designed to be responsive to the fluctuating needs and interests of the public as a whole. To a significant extent, therefore, public events and problems determine program relevance. However, the changes set in motion by the majority opinion below are potentially disruptive of this traditional journalistic process. For in many cases broadcasters will be forced to consider factors other than news value as a motivation for public affairs programming—placing increasing emphasis in content selection on matters which, irrespective of news value, may be the subject of extended treatment in spot announcements prepared by controversial issue advertisers.

An even greater threat to broadcasters' journalistic independence is the resultant intrusion of the FCC into day-to-day station and network operations. There can be no doubt that, from the initial setting of "reasonable regulatory guidelines" to implement the lower court's directive (App. A, A40), the Commission would increasingly be called upon to rule on such matters as (1) what issues are to be covered; (2) what viewpoints on given issues require more or less attention; and (3) what persons or groups are to be allowed to express their views. In short, disputes over the exercise of the newly articulated right will be inevitable and prolific, thrusting the Commission—and likely the courts as well—further and more profoundly into the area of program content judgments.

These considerations are made all the more difficult when it is recognized that the right created by the decision below is apparently one that exists separate and apart from normal application of the fairness doctrine. (*E.g.*, App. A, A26.) Thus, even though a station or a network may have provided full and fair coverage of a controversial issue in its overall programming, the right to purchase spot advertisements would remain undisturbed —possibly effecting an imbalance in such coverage calling for further responsive programming.[7]

These conditions, we submit, represent the very antithesis of the "uninhibited, robust, and wide-open" debate on public issues which the Congress, the courts and the Commission have sought to achieve through such policy prescriptions as the fairness doctrine. The newly imposed right will complicate rather than enhance public debate, encourage the disproportionate expression of views by interests reflecting the most wealth, and necessarily invite an enlarged role of government supervision over the choice of issues and spokesmen. In the process, by government intrusion and the force of implementation, broadcasters will be confronted with mounting inflexibility in carrying out their programming and journalistic roles.

As such, the decision below has far-reaching consequences for both the manner in which broadcasting is conducted on a day-to-day basis and the degree to which the federal administrative apparatus charged with the overall regulation of broadcasting will be called upon to

[7] Confusion also exists as to whether, pursuant to the system imposed by the lower court, a broadcaster could present a contrasting and follow-up viewpoint in other than a spot announcement context if the "opening" viewpoint had been expressed in this manner, particularly if the counter spokesman asserts his "right" to a presentation of his views in an advertising format. This aspect of the ruling also appears inconsistent with the decision of a different panel of the Court of Appeals below in *Green* v. *FCC*, 447 F.2d 323 (D.C. Cir. 1971), wherein the court observed that "not every advertisement carrying a controversial message . . . calls for response through a similar spot announcement format." 447 F.2d at 332.

respond. The broad potential impact upon broadcasting and the regulatory process under which it operates, furnish independent and ample reason why certiorari should be granted.

II. The Court of Appeals Decision Is in Direct Conflict With Decisions of the Courts of Appeals for the First and Third Circuits

In determining that the First Amendment establishes a right of access to broadcast facilities, the court's decision below is squarely in conflict with prior decisions of the First and the Third Circuits on the matter.

While cognizant of the well-established principle that the First Amendment applies to governmental and not to private actions,[8] the court below found that the interrelationship between the FCC and its licensees is such that broadcast station operation effectively represents "state action" to which First Amendment protections extend. (App. A, A11-A18.) That basic finding, however—essential to the Court's ultimate holding—as well as the consequent entitlements it implies, were specifically eschewed in *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied* 327 U.S. 779 (1946). In rejecting a religious organization's claim that it had a statutory and First Amendment right to purchase time on a station for the broadcast of its programs, the Third Circuit expressly pointed out that the broadcaster "is not an instrumentality of the federal government" for constitutional purposes. *Id.* at 601. Rather, the court recognized that under the regulatory scheme established by the Communications Act, a significant separation between the broadcaster and the state is evident in Congress' having "confided the selection of program material to be broadcast to the taste and discrimination of the broadcasters." *Id.* at 600. The Court

[8] See, e.g., *United States* v. *Guest*, 383 U.S. 745, 755 (1966).

further emphasized that while broadcasters might be considered "public trustees," a radio station is clearly not a public utility "in the sense that it must permit broadcasting by whoever comes to its microphones." *Id.* at 600-01.[9] Similarly, in *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950), the First Circuit adopted the District Court's view that broadcast licensees' conduct did not constitute "state action" as to which the First Amendment right of access asserted and upheld below would apply.[10]

Significantly, the majority opinion below specifically acknowledged the inconsistency of its decision with the two cases cited, but dismissed those decisions as representing a "crabbed judicial view of 'state action'." (App. A, A11.) The court further found the *Red Lion* decision —read to be "a clarion call for a new public concern and activism regarding the broadcast media"—to clear the path of such "doctrinal impedimenta." (App. A, A11.) However, *Red Lion* concerned itself with the lawfulness of particular administrative controls on broadcasters claimed to be statutorily authorized, and the Court in no sense addressed itself to the matter of "state action."

In fact, and as reflected in the *McIntire* and the *Massachusetts Universalist Convention* decisions, the statutory structure established by Congress for the regulation of broadcasting is one in which the primary responsibility for broadcast material is vested not in the Federal Government, but in private entities operating as free from direct interference by the Commission as possible. Judge

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[9] Cf. *Pulitzer Pub. Co.* v. *FCC*, 94 F.2d 249, 251 (D.C. Cir. 1937). Compare *Green* v. *FCC*, *supra* note 7, in which a different panel of the court stated that under the fairness doctrine, "no individual member of the public has the right of access to the air; the licensees may experience their judgment as to what material is presented and by whom . . ." 447 F.2d at 328.

[10] See also *Avins* v. *Rutgers*, 385 F. 2d 151, 153 (3d Cir. 1967), *cert. denied* 390 U.S. 920 (1968).

McGowan correctly observed in his dissent (App. A, A43):

> This is the system which Congress has, wisely or not, provided as the alternative to public ownership and operation of radio and television communications facilities. This approach has never been thought to be other than within the permissible limits of constitutional choice . . . .

And as the First and Third Circuits have recognized, the relationship long ago established between broadcasting and the Federal Government is not consistent with the lower court's determination that private licensee decisions constitute "state action." Before that view is abandoned or reversed, and lest the *Red Lion* decision be read, as the lower court interpreted it, to be a "clarion call" for "new public . . . activism" requiring the type of judicial invention evidenced in this case, review by this Court is required.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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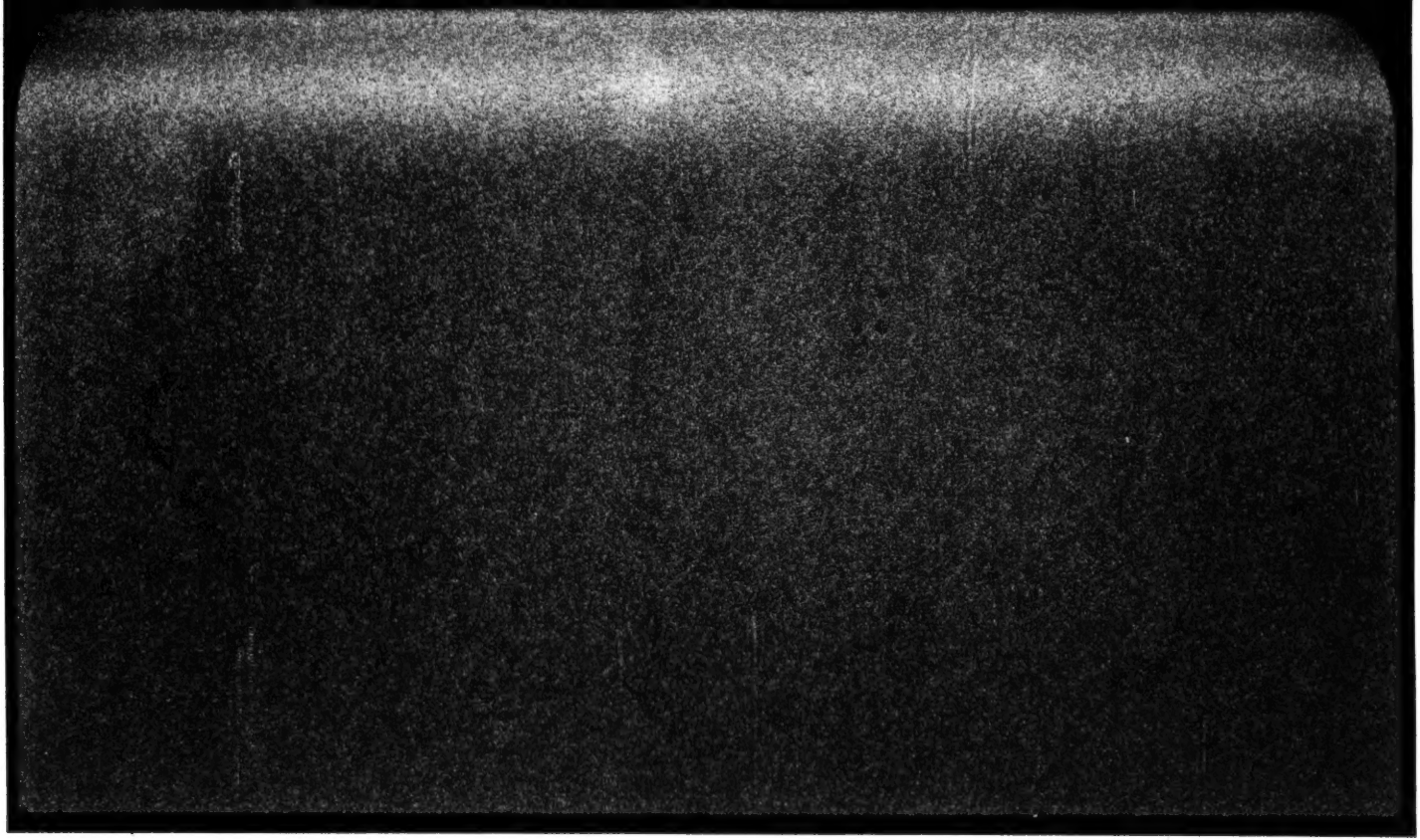

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,492

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC., INTERVENOR

No. 24,537

DEMOCRATIC NATIONAL COMMITTEE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING COMPANIES, INC. and COLUMBIA BROADCASTING SYSTEM, INC., INTERVENORS

Petitions for Review of Orders of the Federal Communications Commission

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Decided August 3, 1971

Mr. Thomas R. Asher, with whom *Messrs. Albert H. Kramer* and *Michael Schneiderman* were on the brief, for petitioner in No. 24,492.

Mr. Joseph A. Califano, Jr., with whom *Messrs. David H. Lloyd* and *Irvin B. Nathan* were on the brief, for petitioner in No. 24,537.

Mr. Daniel R. Ohlbaum, Deputy General Counsel, Federal Communications Commission, for respondents.

Messrs. John H. Conlin, Associate General Counsel, and *Stuart F. Feldstein*, Counsel, Federal Communications Commission, were on the brief for respondents in No. 24,492. *Mr. John H. Conlin* and *Miss Katrina Renouf*, Counsel, Federal Communications Commission, were on the brief for respondents in No. 24,537.

Mr. Henry Geller, General Counsel, Federal Communications Commission, at the time the record was filed, also entered an appearance for respondent Federal Communications Commission in No. 24,492.

Mr. Howard E. Shapiro, Attorney, Department of Justice, entered an appearance for respondent United States of America.

Mr. Ernest W. Jennes, with whom *Messrs. Charles A. Miller* and *Henry Goldberg* were on the brief, for intervenor in No. 24,492.

Mr. J. Roger Wollenberg, with whom *Messrs. Timothy B. Dyk* and *Daniel Marcus* were on the brief, for intervenor Columbia Broadcasting System, Inc. in No. 24,537.

Messrs. James A. McKenna, Jr. and *Vernon L. Wilkinson* were on the brief for intervenor American Broadcasting Companies, Inc. in No. 24,537.

Before WRIGHT, MCGOWAN and ROBINSON, *Circuit Judges.*

Opinion filed by WRIGHT, *Circuit Judge.*

Dissenting opinion filed by MCGOWAN, *Circuit Judge.*

WRIGHT, *Circuit Judge*: In these cases we are asked to decide whether a broadcast licensee may, as a general policy, refuse to sell any of its advertising time to groups or individuals wishing to speak out on controversial public issues. The Federal Communications Commission concluded that such a policy is permissible.[1] We reverse the Commission's decision. And we remand for further proceedings.

The principle at stake here is one of fundamental importance: it concerns the people's right to engage in and to hear vigorous public debate on the broadcast media. More specifically, it concerns the application of that right to the substantial portion of the broadcast day which is sold for advertising. For too long advertising has been considered a virtual free fire zone, largely ungoverned by regulatory guidelines. As a result, a cloying blandness and commercialism—sometimes said to be characteristic of radio and television as a whole—have found an especially effective outlet. We are convinced that the time has come for the Commission to cease abdicating responsibility over the uses of advertising time. Indeed, we are convinced that broadcast advertising has great potential for enlivening and enriching debate on public issues, rather than drugging it with an overdose of non-ideas and non-issues as is now the case.

Under attack here is an allegedly common practice in the broadcast industry—airing only those paid presentations which advertise products or which deal with "non-controversial" matters, and confining the discussion of controversial public issues to formats such as the news or documentaries which are tightly controlled and edited by the broadcaster. In the Commission's view, an attack on the permissibility of this practice "goes to the heart of the system of broadcasting which has developed in this coun-

[1] *Business Executives Move for Vietnam Peace*, 25 F.C.C.2d 242 (1970); *Democratic National Committee*, 25 F.C.C.2d 216 (1970).

try." [2] We disagree. The actual issue before us is relatively narrow and we decide it narrowly. We do not have to cut to the "heart" of our system of broadcasting; we leave undisturbed the licensee's basic right to exercise judgment and control in public issue programming and the sale of advertising time. All we do is forbid an *extreme* form of control which totally excludes controversial public debate from broadcast advertising time.

We hold specifically that a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted. We do not hold, however, that the planned announcements of the petitioners—or, for that matter, of any other particular applicant for air time—must necessarily be accepted by broadcast licensees. Rather, we confine ourselves to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many "editorial advertisements" will be put on the air.

I

Both petitioners in these cases are organizations whose primary *modus operandi* is public persuasion and communication. As a rule, they do not attract attention to their views by performing newsworthy acts, such as engaging in civil disobedience or organizing mass demonstrations. They depend, instead, on their ability to get a hearing—as full as possible and as direct as possible—from the general public. Surely radio and television would seem to be the most effective media for their purposes. Yet they contend that their self-expression on those media—and, therefore, the public's access to their views—is significantly inhibited by broadcaster policies barring any and all paid editorial messages from the airwaves.

[2] *Democratic National Committee, supra* Note 1, 25 F.C.C.2d at 221.

The Business Executives Move for Vietnam Peace (BEM) is a national organization of over 2,700 business owners and executives, organized in opposition to the war. BEM apparently believes that it is in a position to offer the public a unique viewpoint on what is no doubt one of the great political and moral issues of our time. In order to communicate that viewpoint, it prepared several recorded one-minute radio announcements. The announcements urged "immediate withdrawal of American forces from Vietnam and from other overseas military installations" and featured statements by leading businessmen and retired military officers whose views may carry particular weight with the general public. BEM sought to buy time to air these announcements on the broadcast media, just as commercial advertisers do. It must have seemed an extraordinarily effective means of directly communicating its ideas and sense of urgency to the broad listening audience.

In June 1969 BEM sought to purchase time for its announcements on WTOP, an all-news radio station in the nation's capital. Like most broadcasters, WTOP sells substantial amounts of time for short advertisements. Yet over a period of eight months it repeatedly refused to sell any time to the business executives. WTOP cited no particular objection to the planned announcements. Rather, it relied solely upon an across-the-board policy barring all editorial advertisements—"its long established policy of refusing to sell spot announcement time to individuals or groups to set forth views on controversial issues." [3] BEM then filed a complaint with the Federal Communi-

[3] WTOP also stated "that 'subjects of this type require a more in-depth analysis than can be provided in a 10, 20, 30 or 60 second announcement.'" *Business Executives Move for Vietnam Peace*, *supra* Note 1, 25 F.C.C.2d at 242. There is no indication, however, that WTOP's "long established policy" of refusing to sell time for *any* controversial advertisement would have permitted it to sell BEM 5 minutes or 10 minutes for a more "in-depth" treatment of its antiwar views. For a discussion of the permissibility of a flat ban on "short" public issue advertisements, *see* text at page [A-26] *infra*.

cations Commission alleging violations of both the fairness doctrine and the First Amendment.

The Democratic National Committee (DNC) came to the Commission with much the same sort of complaint. It stated that it was in the process of planning an extensive media campaign to communicate the Democratic Party's views on crucial issues and to solicit funds. In our political system, it is of obvious importance that the public have access—as direct and full as possible—to the views of the political parties. A party currently out of office may well regard such communication as particularly vital. Yet DNC alleged that it confronted several obstacles to direct self-expression on the broadcast media, among them the refusal of some broadcasters to sell time for comment on controversial public issues. Unlike the business executives, DNC did not complain of any individual refusal to sell time for a particular editorial advertisement. Rather, it cast the issue in a somewhat different light by seeking a declaratory ruling from the Commission that "[a] broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues."

The Commission considered the two cases together and rejected the arguments of both BEM and DNC on the same day. The issues involved did not overlap completely. For example, the Commission found a defect in the vagueness and generality of BEM's fairness doctrine complaint,[4] and it resolved DNC's contention concerning fund

[4] In its original complaint, BEM alleged generally that WTOP had failed to cover antiwar views fully and fairly. However, it offered no specific proof whatever of its allegations, and WTOP, on the other hand, offered a lengthy compilation of news and interview shows which aired the opinions of some antiwar groups and individuals. BEM has not pressed its fairness doctrine argument on appeal, but rather has relied solely upon the First Amendment right-of-access contention which it also made before the Commission. Therefore, we need not consider here the Commission's holding that BEM failed to shoulder its full burden of going forward under the fairness doctrine.

solicitation by noting that all three television networks had agreed to accept such solicitations and by stating that any broadcaster policy of confining solicitations to election periods alone "would appear arbitrary." [5] On the matters central to these petitions for review, however, the Commission resolved both cases in the same fashion, and we, therefore, are also considering them as one.

The Commission held that it is permissible for a broadcast licensee to follow a general policy of rejecting all editorial advertisements. The essence of its reasoning in the two cases was as follows: First, it interpreted the fairness doctrine to allow rejection of paid controversial announcements. The doctrine, evolved by the Commission and endorsed generally in the Communications Act, demands that all controversial issues of public importance be covered both fully and fairly by broadcasters. Yet the Commission held that it leaves the licensees broad leeway to exercise their professional judgment as to "the format for presentation of controversial issues 'and all others facets of such programming.' " Editorial advertising, the Commission said, is simply one of several possible formats for coverage of public issues. Under the permissive "reasonableness" standard of the fairness doctrine, acceptance of that particular format is by no means compulsory.

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[5] All three television networks also commented on the sale of time for editorial advertising. CBS stated it would sell no time for such advertising, although an exception would be made for broadcasts on behalf of political candidates or ballot propositions. ABC said it would not sell time to most groups for public issue advertising since that would inspire a "flood" of requests, but it would "be prepared, consistent with its other obligations, to accept such orders for time from major political parties as can be accommodated on a reasonable basis." And NBC stated it "has no policy which would prevent the purchase of program time envisioned by DNC." We are constrained to note here that any discrimination in the sale of editorial advertising time in favor of political parties alone or the "major" political parties—and totally excluding other more issue-oriented groups or "minor" political parties—would be highly suspect under the First Amendment. *See* text at pages [A-30 - A-32] *infra*.

Second, the Commission interpreted the First Amendment to be equally permissive. Its reasoning on this point was rather sparse. It made no effort, for example, to identify the peculiar First Amendment interests attaching to paid editorial announcements as opposed to coverage of controversial issues on news, interview or discussion programs. Instead, it was content to raise the spectre of the "chaos" and other practical difficulties that, it said, would attend a right of access to the broadcast media. The Commission concluded that the fairness doctrine's requirement of full and fair coverage—tolerant as it is of a flat ban on the editorial advertisement format of expression—provides as much protection of public debate as the First Amendment demands.

Before this court, both petitioners make substantially the same attack on the Commission's decision. They do not ask for a ruling that *all* editorial advertisements submitted to broadcasters must be accepted. Nor do they seek to foreclose entirely the broadcasters' exercise of reasonable discretion. What they advocate is a *limited* right of access to radio and television for paid public issue announcements. They attack the Commission's ruling that a total exclusion of such announcements is permissible.

II

Petitioners have left no stone unturned in their attack on the exclusion of editorial advertising. They have invoked the Communications Act's "public interest" requirement [6] and the statutory-regulatory fairness requirement [7]—as well as First Amendment principles—to support their argument. In other contexts, we might attempt

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[6] 47 U.S.C. §§ 307(d), 309(a) (1964).

[7] 47 U.S.C. § 315(a) (1964). For a discussion of the regulatory development of the fairness doctrine and its eventual adoption in the Communications Act, *see Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 375-381 (1969).

to avoid the constitutional issue by coming to a decision on nonconstitutional grounds. But that course is neither fruitful nor possible here.

Speaking specifically of the Commission, the Supreme Court has stressed the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 381 (1969). Thus the nonconstitutional question here is whether there are "compelling indications" that the public interest and fairness requirements compel some opening for public issue advertisements on radio and television. In matters of allocating burdens, reforming procedures and ensuring full attention to all relevant factors in agency decision making, we have not been reluctant to reverse the Commission in order to vindicate "the public interest." [8] We have also intervened to see that broad policies developed by the Commission under the fairness doctrine are applied fully and consistently to all cases.[9] However, when we are asked to reverse major substantive interpretations of the grand and open-ended statutory requirements, we tread somewhat more difficult terrain. Obviously, the requirements mean something and there must be a great range of actions which they foreclose to the Commission; but, in establishing the necessary guidelines, we must ourselves seek extrinsic guidance.

In these cases, that guidance comes from the Constitution. Petitioners have presented no "compelling" evidence from legislative history to indicate a congressional policy in favor of, or even a real congressional attention to, editorial advertising. Rather, their arguments on the non-

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[8] *See, e.g., Office of Communication of United Church of Christ* v. *F.C.C.*, 123 U.S.App.D.C. 328, 359 F.2d 994 (1966); 138 U.S. App.D.C. 112, 425 F.2d 543 (1969).

[9] *See, e.g., Retail Store Employees Union, Local 880* v. *F.C.C.*, —— U.S.App.D.C. ——, 436 F.2d 248 (1970).

constitutional points closely parallel their constitutional arguments. The general policy considerations which they invoke encompass all of the interests that would have to be evaluated under the relevant First Amendment law. It would make no sense for us to blind ourselves to the constitutional status of those interests and to the doctrine that has been build up around them.

What then might be the "compelling indications" we are to consider? The ones which seem to us truly "compelling" involve First Amendment principles. Thus we conclude that the constitutional question must be faced and is, indeed, the essence of these cases. Whether our decision is styled as a "First Amendment decision" or as a decision interpreting the fairness and public interest requirements "in light of the First Amendment" matters little.

III

It has always been clear that the broadcast media—so vital to communication in our society—are affected by strong First Amendment interests.[10] Yet the nature of those interests has not been so clear; an evolution of constitutional principles in this area is still very much in progress. Until quite recently, the only interest raised to constitutional status was that of the broadcast licensees themselves. In a leading case, the Commission's powers over program content were attacked and upheld with reference solely to the licensees' right of immunity from governmental interference with their "speech." The scarcity of broadcast frequencies was said to justify some regulation trenching on the broadcasters' First Amendment interests. *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943). These cases mark a new effort by mem-

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[10] *See, e.g., United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948). Congress itself has prohibited any interference by the Commission with "the right of free speech by means of radio communication." 47 U.S.C. § 326 (1964).

bers of the public to assert *their* First Amendment interests in the operations of radio and television.

There is scant precedent for such an effort. Indeed, the few previous attempts by individuals or groups to enforce their First Amendment interests in court have failed. In each case, the litigants have run up against not only an unreceptiveness to their constitutional theory, but also a crabbed judicial view of "state action"—a view that the "[First] Amendment limits only the action of Congress or of agencies of the federal government and not private corporations such as [broadcast licensees]." *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 1 Cir., 183 F.2d 497, 501 (1950); *McIntire* v. *Wm. Penn Broadcasting Co. of Philadelphia*, 3 Cir., 151 F.2d 597, 601 (1945). *See also Post* v. *Payton*, E.D. N.Y., 323 F. Supp. 799 (1971).

We believe the path is now clear of such doctrinal impedimenta. Perhaps the most important recent development is the Supreme Court's seminal decision in *Red Lion Broadcasting Co., supra.* There the Court upheld another aspect of the Commission's regulation of program content —the fairness doctrine's personal attack and campaign editorial rules. However, the Court's opinion went well beyond the scarcity rationale of the *National Broadcasting Co.* case. It justified the Commission's interference with broadcasters' free speech by invoking specifically constitutional rights of the general public which, it said, underlie and support the fairness doctrine rules at issue. Issuing what must become a clarion call for a new public concern and activism regarding the broadcast media, the Court stated that "the people as a whole retain their * * * collective right to have the medium function consistently with the ends and purposes of the First Amendment." [11] It went on to say:

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[11] 395 U.S. at 390.

"* * * The right of free speech of a broadcaster * * * does not embrace a right to snuff out the free speech of others. * * *

* * * *

"* * * [A] licensee has no consitutional right * * * to monopolize a radio frequency to the exclusion of his fellow citizens. * * *

* * * *

"* * * It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. * * *" [12]

Of course, the *Red Lion* Court had to invoke the public's First Amendment interests for a narrow purpose only—to uphold legislative and administrative action already taken. It did not have to reach the issue, presented in these cases, of invoking those interests for a direct attack on broadcasters' policies approved by the Commission. However, the language used by the Court is significantly expansive. It spoke of a First Amendment "right" held by "the people as a whole." A constitutional "right" is hardly deserving of the name if it can function only to *permit* legislative and administrative action and if its content depends entirely upon the current policies of the legislative and executive branches. The First Amendment, after all, contains nothing analogous to the fifth section of the Fourteenth Amendment, authorizing Congress to enforce constitutional interests unenforceable by the courts.[13]

For many purposes, it is proper to consider broadcast licensees as "private" businesses. Yet, for purposes of

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[12] *Id.* at 387, 389, 390.

[13] On the effect of the specific language in the fifth section of the Fourteenth Amendment, *see Oregon* v. *Mitchell*, 400 U.S. 112 (1970); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). Of course, the Fourteenth Amendment does not apply to federal regulation of the broadcast industry, since no interference with the states is involved.

the First Amendment, "[o]wnership does not always mean absolute dominion." *Marsh* v. *Alabama*, 326 U.S. 501, 506 (1946). "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans* v. *Newton*, 382 U.S. 296, 299 (1966). The *Red Lion* Court itself commented on the impermissibility of "private censorship" and cited old doctrine that "'[f]reedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.'" [14] The reach of the First Amendment, therefore, depends not upon "public"—"private" technicalities, but upon more functional considerations. They are (1) the governmental involvement in or public character of a particular enterprise, and (2) the importance or suitability of that enterprise for the communication of ideas.[15]

The last few decades of court decisions expanding the concept of "state action" have focused on myriad indicia of governmental involvement and public character. Many

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[14] 395 U.S. at 392, quoting *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

[15] Most "state action" cases, of course, have been concerned with equal protection rights under the Fourteenth Amendment rather than with free speech rights under the First Amendment. However, the principle of governmental involvement developed therein has been applied equally well in the First Amendment context. *See, e.g., Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451 (1952); *Farmer* v. *Moses*, S.D. N.Y., 232 F.Supp. 154 (1964). The principle of "public character" may be found in decisions dealing directly with application of First Amendment rights to "private" entities. *See., e.g., Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Tanner* v. *Lloyd Corp., D. Ore.*, 308 F.Supp. 128 (1970); *Diamond* v. *Bland*, 91 Cal. Rptr 501, 477 P.2d 733 (1970). The importance and suitability of a particular place for the communication of ideas has been stressed in all of the cases cited above, as well as in all of the access-to-public forum cases, *see* Notes 40-43 *infra*.

of them are apparently applicable to the operations of the broadcast industry.[16] But we need stress only two more basic factors which, taken together, bring broadcast licensees well within the ambit of the First Amendment for the purposes of these cases. First, the general characteristics of the broadcast industry reveal an extraordinary relationship between the broadcasters and the federal government—a relationship which puts that industry in a class with few others.[17] It is one of "interdependence" and "joint participa[tion]." *See Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961). "[T]he [federal] regulatory system," it has been said, "is as much responsible for the existence of a broadcasting medium as the Bureau of Engraving is responsible for the existence of United States currency." [18] It has

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[16] Dissenting in the BEM case now under review, Commissioner Johnson dealt exhaustively with the Supreme Court's state action doctrine, isolating eight separate indicia of "state action." He argued very strongly that all eight indicia apply to broadcast licensees. *Business Executives Move for Vietnam Peace, supra* Note 1, 25 F.C.C.2d at 253-264. Because this highly analytical—one might say mechanical—approach runs the risk of reading Supreme Court opinions for more than they mean, we have chosen to paint with a broader brush. Ours is the approach which the Supreme Court seems in fact to have used in the past.

[17] In particular, broadcasting may be easily distinguished from the newspaper industry in terms of "state action." In two recent decisions, courts have held that newspapers are not subject to the First Amendment. *Associates & Aldrich Co., Inc.* v. *Times Mirror Co.*, 9 Cir., 440 F.2d 133 (1971); *Chicago Joint Board* v. *Chicago Tribune Co.*, 7 Cir., —— F.2d ——, 39 U.S. L. WEEK 2360 (December 17, 1970). While the governmental involvement in and public character of newspapers in surely less than that of broadcasting, we of course need express neither agreement nor disagreement with the cited decisions here.

[18] Pemberton, *The Right of Access to Mass Media*, in N. DORSEN (ed.), THE RIGHTS OF AMERICANS 277, 290 (1971). The Government is also directly responsible for the very existence of particular broadcasters. "[E]xisting broadcasters have often attained their present position because of their initial government selection in competiton with others * * *. * * * [Their present] advantages are the fruit of a preferred position conferred by the Government." *Red Lion Broadcasting Co.* v. *F.C.C.*, *supra* Note 7, 395 U.S. at 400.

long been recognized that the airwaves are "a limited and valuable part of the public domain," [19] leased out temporarily by the federal government which retains ultimate control over them.[20] Federal agency review and guidance of broadcasters' conduct is automatic, continuing and pervasive.[21] For broadcast licensees are considered the "proxies" or "fiduciaries" of the people.[22] Almost no other private business—almost no other regulated private business—is so intimately bound to government and to service to the commonweal.

A second and even more important factor is the *specific* governmental involvement in the broadcasters' action now under review here. All of the cases in which previous courts have characterized broadcasters as mere "private corporations" immune from First Amendment constraints, *see* text at page [A-11] *supra*, have involved direct suits against broadcast licensees. In the cases before us now,

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[19] *Office of Communication of United Church of Christ* v. *F.C.C.*, *supra* Note 8, 123 U.S.App.D.C. at 337, 359 F.2d at 1003.

[20] The licensing-out or delegation of governmental authority has been an element in some of the Supreme Court's most expansive state action decisions. *See Evans* v. *Newton*, 382 U.S. 296 (1966); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Smith* v. *Allwright*, 321 U.S. 649 (1944). The mere existence of a licensing or delegation relationship is not, of course, enough by itself to establish state action; licensed pharmacists cannot be equated with licensed broadcasters. The actual extent of governmental involvement and the public character of the enterprise in question remain the final tests of state action.

[21] The activities of a governmental regulatory agency have also been emphasized in at least one of the Supreme Court's expansive state action decisions. *See Public Utilities Comm'n* v. *Pollak*, *supra* Note 15, 343 U.S. at 462, *citing American Communications Ass'n* v. *Douds*, 339 U.S. 382, 401 (1950) ("[W]hen authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself.").

[22] *See Red Lion Broadcasting Co.* v. *F.C.C.*, *supra* Note 7, 395 U.S. at 394, 396; *Office of Communication of United Church of Christ* v. *F.C.C.*, *supra* Note 8, 123 U.S.App.D.C. at 337, 359 F.2d at 1003.

however, the Commission has given its imprimatur to the flat ban on editorial advertising. It specifically considered and specifically authorized the flat ban. Thus we are called upon to review not simply a private decision, but a decision by a government agency, a decision which must inevitably provide guidance for future broadcaster action.

There is ample authority for the principle that specific governmental approval of or acquiescence in challenged action by a private organization indicates "state action." [22] Indeed, in a case similar to ours the Supreme Court held that a private bus company franchised by the federal government and regulated by the District of Columbia Public Utilities Commission could be subject to First Amendment constraints. It emphasized the specific regulatory acquiescence in the challenged action of the bus company:

> "* * * In finding [state action] we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. We do, however, recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Com-

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[22] The Supreme Court has said that "action of state courts and judicial officers in their official capacities is to be regarded as action of the State * * *." *Shelley* v. *Kraemer*, 334 U.S. 1, 14 (1948). *See New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 DUKE L. J. 219, 227-230. *See also* this court's discussion of the *Shelley* principle—which surely must apply to actions of a federal administrative agency specifically approving private action—in *Edwards* v. *Habib*, 130 U.S.App.D.C. 126, 397 F.2d 687 (1968). Specific governmental acquiescence, as well as specific approval, has also been a focus of Supreme Court state action decisions. *See Marsh* v. *Alabama*, *supra* Note 15, 326 U.S. at 507 & n.4, 509; *Burton* v. *Wilmington Parking Authority*, *supra* Note 20, 365 U.S. at 725.

> mission of the District of Columbia which is an agency authorized by Congress. We rely particularly upon the fact that that agency, pursuant to protests against the [challenged action], ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby. * * *"

Public Utilities Commission v. *Pollak*, 343 U.S. 451, 462 (1952). (Footnote omitted.)

Broadcasting's importance and suitability for communication of ideas need not be labored. Mere presence of large and appropriate audiences (and thus opportunities for effective communication) has sometimes been emphasized by the courts to show the relevance of First Amendment protections.[24] In *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), for example, the Supreme Court held that a privately owned shopping center was an appropriate place for the "speech" of labor union picketers. It stressed "[t]he large-scale movement of the country's population from the cities to the suburbs [that] has been accompanied by the advent of the suburban shopping center * * *." *Id.* at 324. With this demographic change, the "speech" that once took place on the public streets around downtown shopping areas must be allowed to move to privately owned parking areas in the suburbs, for that is where the relevant audiences now are. The technological and cultural changes connected to the current preeminence of the broadcast media as our primary means of communication are no less striking. The soap box orator and the

[24] *See, e.g., Wolin* v. *Port of New York Authority*, 2 Cir., 392 F.2d 83, 90-91 (1968) ("The propriety of a place for use as a public forum * * * [may be established if] the place is where the relevant audience may be found."). Of course, the cases before us involve the right to speak on a *medium* of communication, not in a particular *place*. Thus many of the considerations are different; but the basic concern with the ability to reach the relevant audience applies in both situations.

leafleter are becoming almost obsolescent; their Saturday afternoon audiences have increasingly moved indoors—in front of their television sets.[25]

Moreover, unlike most of the private entities held to be subject to First Amendment constraints, the broadcast media are specifically dedicated to communication. They function as both our foremost forum for public speech and our most important educator of an informed people. In a populous democracy, the only means of truly mass communication must play an absolutely crucial role in the processes of self-government and free expression, so central to the First Amendment. That can be said of almost no other "private" enterprise.

IV

Broadcast licensees, then, serve not only as "speakers" but also as administrators of a highly valuable communications resource, subject to First Amendment constraints. Their dual role demands that their own constitutional interests in free speech coexist with those of the general public. But what are the dimensions of the public's First Amendment interests in the operation of radio and television? And how do they apply to the issue of editorial advertising?

It is particularly important that these cases deal only with the public's First Amendment interests in broadcasters' allocation of advertising time. They deal only with time relinquished by broadcasters to others; petitioners argue only that, in relinquishing that time, broadcasters must not discriminate against protected expression. In normal programming time, closely controlled and edited by broadcasters, the constellation of constitutional interests would be substantially different. In news and

[25] The Supreme Court has noted that broadcast "technology * * * supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news * * *." *Red Lion Broadcasting Co.* v. *F.C.C.*, *supra* Note 7, 395 U.S. at 386 n.15.

documentary presentations, for example, the broadcasters' own interests in free speech are very, very strong.[26] The Commission's fairness doctrine properly leaves licensees broad leeway for professional judgment in that area. But in the allocation of advertising time, the broadcasters have no such strong First Amendment interests. *Their* speech is not at issue; rather, all that is at issue is their decision as to which other parties will be given an opportunity to speak.

Though the broadcasters themselves have no substantial First Amendment interest in the allocation of advertising time, we might expect that the interest of members of the public—potential advertisers—would be quite strong. However, the Commission and the broadcaster-intervenors have argued just the opposite. They contend that the public's constitutional concerns do not extend to advertising time. Thus we must decide whether the substantial block of the broadcast day devoted to advertising is but a vacuum, devoid of First Amendment constraints, in the midst of a medium powerfully affected by those constraints—a desert in the midst of an oasis.

The Commission and intervenors work from the following premise. They define the public's overall constitutional interests in the operations of radio and television quite narrowly. The public's only interest, they suggest, is as viewers and listeners—not as speakers. They cite to us the *Red Lion* Court's mention of "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences" over the broadcast media.[27] And they read that statement to set forth not only *an* interest of the public, but the *only* interest of the public.

Working from that premise, the Commission and intervenors contend that the public already receives "suitable

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[26] *See id.* at 396.

[27] *Id.* at 390.

access" to controversial views on normal programming time. Application of the fairness doctrine's requirement of full and fair coverage of public issues in non-advertising time, they suggest, ensures that all views on these issues will in fact be presented. They assume that editorial advertising adds nothing new to the debate. The fairness guarantee alone, they say, is enough to eliminate petitioners' claim on advertising time—and enough to satisfy the First Amendment. We disagree.

Surely the public's interest in free access to the full spectrum of ideas and controversial views on radio and television is highly important. The right to receive ideas and information is deeply rooted in First Amendment law.[28] The *Red Lion* Court stressed that right, since it was the one primarily relevant to the fairness doctrine rules at issue in the case. But we do not believe that the *Red Lion* decision makes the goal of an informed public the exclusive First Amendment interest constraining broadcasters. Certainly the Supreme Court has done so in no other context.

The public has a First Amendment interest in the mode or manner—as well as the content—of public debate aired on the broadcast media. The *Red Lion* Court itself stated specifically that "[i]t is the purpose of the First Amendment to preserve an *uninhibited* marketplace of ideas [in the broadcast media]." [29] This court, similarly, has said that the Commission is obliged to administer the airwaves "in such a manner that * * * debate on public issues is 'uninhibited, robust and wide-open.'" *National Ass'n of Theatre Owners* v. *F.C.C.*, 136 U.S.App.D.C.

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[28] *See Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); *Lamont* v. *Postmaster General*, 381 U.S. 301, 307-308 (1965) (Mr. Justice Brennan, concurring); *Martin* v. *City of Struthers*, 319 U.S. 141, 143 (1943). The "right to receive," however, has not been considered the central First Amendment interest, and never the only First Amendment interest.

[29] 395 U.S. at 390. (Emphasis added.)

352, 365, 420 F.2d 194, 207 (1969). The reference to "uninhibited" debate is, of course, borrowed from the Supreme Court's decision in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). The Court there extended First Amendment protection to some forms of libel on public officials. It made clear that the Amendment's concern extends beyond the mere fostering of speech whose content will properly inform the public. The *New York Times* decision establishes a strong First Amendment interest in vigorous, "wide-open" public debate.

Furthermore, we must take note of a third—but, perhaps, most important—First Amendment interest. That is the interest of individuals and groups in effective self-expression. The *Red Lion* Court did say that "it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." [30] For, as it pointed out, broadcast time is necessarily limited. But the limited nature of broadcast time does not dictate that the individual and group interest in self-expression be brushed aside entirely; it allows for a reasonably regulated, "abridgeable" right to speak. The First Amendment values of individual self-fulfillment through expression and individual participation in public debate have long been recognized.[31] We all have an interest in speaking up ourselves as well as in hearing others. It is too late to argue that the First Amendment protects ideas but not an individual's interest in expressing them and doing so in his own way.

We conclude, then, that the public's First Amendment interests constrain broadcasters not only to provide the full spectrum of viewpoints, but also to present them in an uninhibited, wide-open fashion and to provide opportu-

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[30] *Id.* at 388.

[31] *See, e.g.*, T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4-7 (Vintage ed. 1967).

nity for individual self-expression.[32] How do these three First Amendment interests relate to a more specific interest in the airing of editorial advertisements? The answer emerges when we understand the special importance of advertising time to our system of free expression. First, the initial decision to produce an editorial advertisement is in the hands of members of the public. The initiative to present a particular view does not have to come from a member of the broadcaster's staff. Second, a paid advertisement is basically controlled and edited by the advertiser. He is allowed to present his views in a fashion chosen by himself. If an individual is interviewed for a news program, he may expect his comments to be abbreviated and edited; reporters' commentary will qualify what he has to say. For it is the broadcasters' responsibility to be objective, to condense issues into available time for presentation, and to play up or play down views according to the *broadcaster's* opinion of what is important and interesting. But when an individual or group buys time to say its piece, the crucial controls are in its own hands. Editorial advertising is thus a special and separate mode of expression, not simply a duplication of other expression on the same medium.[33]

The importance of initiative and control to the First Amendment interests in wide-open debate and individual self-expression should be obvious. Vigorous, free expression is promoted when members of the public have *some*

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[32] Of course, all three of these interests apply to non-advertising time as well as to advertising time. The Commission, in fact, has encouraged broadcasters to present conflicting views through partisan voices as well as through predigested commentary. *See Democratic National Committee, supra* Note 1, 25 F.C.C.2d at 222-223. However, as we make clear in text, the selective, edited presentation by the Government's licensee of partisan voices on news shows, for example, does not erase the *special* advantages of allowing self-selected partisan voices on advertising time.

[33] *See* text at pages [A-25 - A-26] & Note 37 *infra*. *See also* Note, *A Fair Break for Controversial Speakers: Limitations of the Fairness Doctrine and the Need for Individual Access*, 39 GEO. WASH. L. REV. 532, 557-560 (1971).

opportunity to take the initiative and editorial control into their own hands on the broadcast media. It has traditionally been thought that the best judge of the importance of a particular viewpoint or issue is the individual or group holding the viewpoint and wishing to communicate it to others. In the First Amendment area, our best guarantee has always been a "free market" in which partisans who feel strongly on particular issues may decide on their own to speak out and to speak out in their own way. The present system, allowing a flat ban on editorial advertising, conforms instead to a paternalistic structure in which licensees and bureaucrats decide what issues are "important," how "fully" to cover them, and the format, time and style of the coverage.

Even if broadcasters were to succeed in presenting a full spectrum of viewpoints and partisan spokesmen on non-advertising time, their retention of *total* initiative and editoral control is inimical to the First Amendment. The importance of fair, objective and full treatment of controversial issues on normal programming cannot be doubted. But, as the Supreme Court has said in the context of classroom debate, "supervised and ordained discussion" is not enough. *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969). "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' " *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967). In other words, there is always a strong First Amendment interest in opening up channels for more spontaneous, self-initiated, self-controlled expression.[34]

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[34] We are cognizant of current proposals to reform the Commission's fairness doctrine and invigorate its enforcement, so lackluster in the past. We commend the Commission's consideration of new rules to "encourage and implement" presentation of opposing viewpoints by reemphasizing the obligation to "seek out"

Even in terms of the public's First Amendment interest emphasized by the Commission and intervenors—the interest of "viewers and listeners" in passive access to the full spectrum of viewpoints on radio and television—editorial advertising plays an important role. The concept of "full" coverage of "controversial" issues "of public importance" is vague to say the least, and leaves much

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controversial issues. *Obligations of Broadcast Licensee Under the Fairness Doctrine*, 35 FED. REG. 7820 (1970). But, as the Commission says, the proposed rules would be but a "modest * * * step in promoting access to the media." *Id.* at 7821. They go little beyond the present obligation to give "full" coverage to controversial issues. Such an obligation is inherently difficult to define and enforce. At best, the Commission can evaluate only the *general* willingness of a licensee to "seek out" issues and glaring examples of noncoverage of obviously important issues. The Commission cannot be expected to engage licensees in fine debates over coverage of less obviously life-or-death issues. But the fundamental point—the point we emphasize—is that no matter how "fully" controversial issues might be covered in a perfect broadcasting world, the basic initiative and control remains with the licensee. Because there is not even a partial "free market" opening to the public at large, the crucial First Amendment interests in decentralized initiative and control go unsatisfied.

We realize that there is another possible, but purely speculative, reformation of the fairness doctrine now under consideration which might be supposed to obviate the need for a measure of "free market" access to advertising time. It has been proposed that licensees be required to provide self-edited advertising time to groups or individuals under the fairness doctrine only when a commercial advertiser has already taken a controversial position in his broadcast messages. Such an approach has been taken regarding cigarette advertisements, though that case was said to be extraordinary and not to establish a general precedent. *Banzhaf* v. *F.C.C.*, 132 U.S.App.D.C. 14, 405 F.2d 1082 (1968). But even if that principle were made to apply generally, it would leave the initiative solely in the hands of commercial advertisers: the only issues on which noncommercial groups and individuals could speak through editorial advertisements would be those issues which commercial advertisers had already chosen to raise themselves. Allowing such a narrow group, motivated largely by business profit, to set the agenda for editorial advertising is unconscionable and contrary to First Amendment precepts. It is crucial that noncommercial groups and individuals have the same rights of initiative as commercial advertisers.

to the broadcasters' discretion (and possible oversight).[36] Assuming that broadcasters are sometimes fallible, the goal of a fully informed public is best attained by opening of outlets for members of the public to supplement the licensees' assessments of "importance," "controversiality" and "full" coverage. The Commission's and intervenors' argument might be somewhat stronger if it were designed to support a partial ban on editorial advertising concerning issues and views which have *in fact* been substantially aired on normal programming time.[36] The argument is unconvincing, however, in support of a flat, *per se* ban on any and all editorial advertisements.

Moreover, even if "antiwar views," for example, have in fact been presented on news and interview shows, it is not *necessarily* clear that a particular antiwar editorial advertisement would add nothing to the public's information and understanding. "Viewpoints" cannot be so neatly and infallibly catalogued as the Commission would have us believe. Self-expression and public debate are much more subtle phenomena; matters of style and intensity of feeling are important components.[37] Again,

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[36] The guarantees of full and fair coverage have proved particularly difficult to define and enforce in the past. They have taken on effective meaning only in the most extreme cases of broadcaster irresponsibility. For a depressing critique of the Commission's apparent inability to enforce its own standards, *see* Cox & Johnson, *Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study*, 14 F.C.C.2d 1 (1968).

[36] Even then, however, the special attributes of editorial advertising would not be eliminated by the broadcaster's own coverage. *See* text at pages [A-21 - A-23] *supra* & pages [A-25 - A-26] *infra*.

[37] In *Lee* v. *Board of Regents of State Colleges*, W.D. Wis., 306 F.Supp. 1097 (1969), *affirmed*, 7 Cir., 441 F.2d 1257 (1971), the court held that a school newspaper was obliged under the First Amendment to print antiwar editorial advertising, even though antiwar views could be printed in the newspaper's news and letters-to-the-editor columns. The court stressed the qualitative—and valuable—difference in expression of views through an editorial advertisement. "It is readily apparent," it said, "that a paid advertisement can be cast in such a form as to command much greater attention than a letter to the editor. Large type, photographs,

an across-the-board ban on editorial advertisements—leaving the quality of public debate in the control of one licensee, supplemented by no other autonomous inputs—may well ignore opportunities to enliven and enrich the public's overall information.

We recognize, of course, that the onesidedeness and private editing of particular "spot" editorial advertisements may in the end steer viewers and listeners away from the "truth" by distorting complex issues. Being brief, these "spot" messages—no less than normal broadcast news coverage—may not canvass all possible arguments or develop all possible implications of the position they espouse. But that does not mean that they are unprotected by the First Amendment. Our Constitution protects many forms of misleading and overly simplified political expression in order to ensure robust, wide-open debate. "[N]either factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct * * *." *New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 273. Nor does the brevity of the criticism. We must, then, be very, very slow to judge any sort of speech on public issues worthless. The marketplace of ideas protected by the First Amendment, after all, is not governed by the tastes and intellectual standards of the universities or the broadcast newsroom —or even of judicial chambers.

We conclude, therefore, that the fairness doctrine's goal of full and fair coverage of issues on normal programming time does not eliminate the public's interest in a further, complementary airing of controversial views during advertising time. We must concur in the Supreme Court's only recorded comments on constitutional

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repeated publication and full pages of space are some of the modes of expression available in an editorial advertisement that might not be available in a letter to the editor." *Id.* at 1101. Another court has come to the same result in a newspaper editorial advertising case. *Zucker* v. *Panitz,* S.D. N.Y., 299 F.Supp 102 (1969). *See* text at pages [A-27 - A-29] *infra.*

protection for editorial advertising—comments made in the context of newspapers, like broadcasting a medium which may be expected, if not required, to present the various sides of public issues in its non-advertising space. The Court said that editorial advertisements, unlike commercial advertisements,[35] are of fundamental First Amendment concern, since they deal with political questions. And it protected them from libel law attack to the same extent as the newspapers' own editorial columns, for

> "[a]ny other conclusion * * * might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. * * * The effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.' * * *"

New York Times Co. v. *Sullivan, supra,* 376 U.S. at 266.

V

We come now to the aspect of the broadcasters' policy which, petitioners say, trenches on the First Amendment interest in editorial advertising. The constitutional defect of that policy is somewhat ironic. The *New York Times* Court made clear that the fact distinguishing fully protected editorial advertising from less fully protected commercial advertising is that the former deals with controversial public issues. Indeed, the political nature of editorial advertising places it near the core of the First Amendment. However, the very characteristic which affords it strict constitutional protection is also the characteristic causing the broadcasters' challenged

[35] Commercial advertising—indeed, any sort of commercial speech—is less fully protected than other speech, because it generally does not communicate ideas and thus is not directly related to the central purpose of the First Amendment. *See Breard* v. *City of Alexandria,* 341 U.S. 622 (1951); *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942).

policy to single it out and exclude it from the airwaves. That, we believe, is the crucial aspect of these cases.

It is important to note that petitioners do not attack the exclusion of editorial advertising by broadcasters who accept no advertisements whatever.[39] We do not have to decide whether the broadcast medium inherently amounts to a "public forum" on the order of public streets or parks or meeting halls or even bus terminals.[40] We leave open the possibility that broadcasters may constitutionally relinquish no time at all for advertising of any sort. For the issue in these cases is the permissibility of discrimination, within a given block of advertising time, against "controversial" speech and in favor of commercial and "noncontroversial" speech. We deal here with a forum that already has been opened up by the licensees themselves, opened up for direct broadcast presentations by members of the public.

Fortunately, we do not write on a clean slate in this area. Six courts have confronted discriminations among types of speech like the one challenged here. Every one of them—four federal courts and two state supreme courts—has held that once a forum, subject to First Amendment constraints, has been opened up for commercial and "noncontroversial" advertising, a ban on "controversial" editorial advertising is unconstitutional unless

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[39] DNC's position is somewhat ambiguous. The ruling which it requested from the Commission would, by its terms, apply to all broadcasters, whether or not they accept any advertising. *See* text at page [A-6] *supra*. However, on appeal DNC's arguments have been focused entirely on broadcasters who do already accept noncontroversial advertising. The interests of particular licensees in keeping all advertising off the air were not explored before the Commission or before this court—for example, an all music station may have a very substantial interest in broadcasting no paid announcements. Because the special issues relating to such licensees were not presented here, we do not decide them.

[40] *See, e.g., Schneider* v. *State*, 308 U.S. 147 (1939); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *Wolin* v. *Port of New York Authority*, *supra* Note 24. *See generally* Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 SUP. CT. REV. 1.

clearly justified by a "clear and present danger." *Lee* v. *Board of Regents of State Colleges*, W.D. Wis., 306 F. Supp. 1097 (1969), *affirmed*, 7 Cir., 441 F.2d 1257 (1971); *Zucker* v. *Panitz*, S.D. N.Y., 299 F.Supp. 102 (1969); *Kissinger* v. *New York City Transit Authority*, S.D. N.Y., 274 F.Supp. 438 (1967); *Hillside Community Church, Inc.* v. *City of Tacoma, Wash.*, 455 P.2d 350 (1969); *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal.Rptr 430, 434 P.2d 982 (1967). We join this unbroken line of authority.

First Amendment doctrine governing access to forums for communication has been elaborated often in recent years. The essential test is an exercise in balancing, though weighted in favor of First Amendment values.[41] On one hand, the court must assess the constitutionally protected interest in the particular expressive activity in the particular forum. On the other hand, it must assess the importance of other uses of the forum which may be threatened and the extent to which they actually will be disrupted. Access may be denied only if the disruption caused by a particular type of expression (*e.g.*, public speaking, marching, picketing) clearly overrides the "preferred" interest in free speech. Thus there is some right of access by demonstrators to state capitol grounds[42] but not to a jailyard.[43]

Ordinarily, courts have to make the basic balancing judgment on their own. However, when the administra-

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[41] Most of the cases, other than those cited above in text, have involved access to particular places in order to perform expressive activities such as speaking, leafleting, or demonstrating in some fashion. For general discussions of the cases and the principles applied, *see* H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT (paper ed. 1965); Note, *Regulation of Demonstrations*, 80 HARV. L. REV. 1773 (1967). There is no reason why the general principles applied in cases involving access to *places* should not apply to our cases involving access to a particular *medium* of expression. *See* Note 24 *supra*.

[42] *Cox* v. *Louisiana*, 379 U.S. 536 (1965).

[43] *Adderley* v. *Florida*, 385 U.S. 39 (1966).

tor of a forum has determined to grant access to some speakers or some picketers, he has implicitly made that basic judgment himself. When some public speaking is allowed in a park, the park's administrator has determined that the normal and proper functions of the park will not be excessively harmed by public speaking. If he then attempts to deny access to other public speakers he cannot be heard to claim the opposite. The burden is on him to show some very substantial factor distinguishing the disruption that would cause from that caused by the speaking or picketing already allowed.

The same principle applies to broadcasters who have opened their forum to commercial speech but would close it to controversial political speech. By opening up a forum for some paid presentations, independently edited and controlled by members of the public, the broadcasters have waived any argument that advertising is inherently disruptive of the proper function of their stations. The exclusion of only one sort of advertising—which we have shown to have great First Amendment value—is then highly suspect, a *prima facie* constitutional violation. To justify the exclusion, there must be a substantial factor distinguishing the disruptive effect of editorial advertising from that of commercial advertising.

The content of the idea which the excluded speakers seek to promote is—emphatically—*not* permitted as a distinguishing factor in itself. Indeed, the existence of an exclusionary discrimination apparently based on the content of ideas presents an additional, or greatly heightened, *prima facie* constitutional violation. Both free speech and equal protection principles condemn any discrimination among speakers which is based on what they intend to say.[44] If the First Amendment prohibits any-

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[44] For discussions of the First Amendment-equal protection intersection, *see* Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1482, 1492-1497 (1970); Kalven, *supra* Note 40, 1965 SUP. CT. REV. at 29-30; Van Alstyne, *Political Speakers at Universities: Some Constitutional Considerations*, 111 U. PA. L. REV. 328, 337-339 (1963).

thing at all, it must be a censorial discrimination among ideas. And since First Amendment rights have been held to be "fundamental rights" triggering the strict standard of review under equal protection principles, *Williams* v. *Rhodes*, 393 U.S. 23, 30-31 (1968), it is doubly clear that the burden of justifying any apparent discrimination is very great indeed.

At least 20 years ago, the Supreme Court began condemning discriminations among different exercises of the same type of expression. *Fowler* v. *Rhode Island*, 354 U.S. 67 (1953); *Niemotko* v. *Maryland*, 340 U.S. 268, 272-273 (1951). Both cases involved access to a forum already opened to others. More recently, the Court in *Cox* v. *Louisiana*, 379 U.S. 536 (1965), invalidated a state regulation that permitted labor picketing but not civil rights picketing. In his concurrence, Mr. Justice Black stated that this sort of discrimination is "censorship in a most odious form" and violates both the First Amendment and the equal protection clause. *Id.* at 581. Similarly, in *Adderley* v. *Florida*, 385 U.S. 39 (1966), the Court upheld a ban on demonstrations in a jailyard, but was careful to note that "[t]here is not a shred of evidence in this record * * * [the demonstrators were excluded] because the sheriff objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest." *Id.* at 47.

No doubt a discrimination against all controversial speech—such as we face in these cases—is somewhat less "odious" than a discrimination among different controversial viewpoints on particular issues. But it is a form of censorship just the same.[45] It is a favoritism toward

[45] In *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Rptr 430, 434 P.2d 982, 986 (1967), the California Supreme Court came to the same conclusion as we do on this issue, saying:

"* * * The vice is not that the district has preferred one point of view over another, but that it chooses between classes of ideas entitled to constitutional protection, sanctioning the

the *status quo* and public apathy and, in these cases, a favoritism toward bland commercialism.[46] Such favoritism flies in the face of the First Amendment, whose central purpose is to protect and promote controversy, "uninhibited, robust and wide-open," on public issues.

Moreover, it is by no means clear that a broadcasters' ban on "controversial" advertising does not impermissibly open the door to a *sub rosa* discrimination *among* controversial ideas. The term "controversial" is extraordinarily vague. Some advertisements may not be deemed "controversial"—and may not even be "controversial" for purposes of the fairness doctrine [47]—but may still express ideas, the negative of which would surely be labeled "controversial." [48] Ads for Radio Free Europe or Army re-

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expression of only those selected, and banning others. Thus the district's regulation exercises a most pervasive form of censorship.

"* * * [T]he district's policy * * * affords total freedom of the forum to mercantile messages while banning the vast majority of opinions and beliefs extant which enjoy First Amendment protection because of their noncommercialism. No statistical data is required to demonstrate that in the totality of man's communicable knowledge, that which bears no relationship to material value preponderates."

The Supreme Court of Washington specifically adopted this view in *Hillside Community Church, Inc.* v. *City of Tacoma*, Wash., 455 P.2d 350, 353 (1969).

[46] Commissioner Johnson commented in his dissent that broadcasters "have created a system in which immediate access is granted to one, privileged class of applicants: the commercial peddler of goods and services. * * * We have an individual right of access, all right, but only for hucksters of industrial garbage." *Democratic National Committee, supra* Note 1, 25 F.C.C.2d at 233.

[47] *See Banzhaf* v. *F.C.C.*, 132 U.S.App.D.C. 14, 405 F.2d 1082 (1968); *Green* v. *F.C.C.*, —— U.S.App.D.C. ——, —— F2d —— (Nos. 24470 & 24516, decided June 18, 1971).

[48] In *Wirta* v. *Alameda-Contra Costa Transit District, supra* Note 45, 434 P.2d at 987, the California Supreme Court made the same point very forcefully, and provided several telling examples:

[Footnote continued on Page A 33]

cruiting, for example, may be allowed unanswered on the air, while ads calling the notion of the "free world" a sham or ads calling the Army a threat to democracy would be banned entirely. The line between ideological and nonideological presentations is an almost impossible one to draw. All too often in our society one particular ideology—that of passivity, acceptance of things as they are, and exhaltation of commercial values—is simply taken for granted, assumed to be a nonideology, and allowed to choke out all the rest.[49]

Thus the editorial advertising ban, particularly when licensees accept advertising generally, establishes an unmistakable infringing of First Amendment liberties. The Commission and the broadcasters, then, bear a very heavy burden of justification. Whether we require a "compelling" justification, an "overriding" justification, or a "clear and present danger" is relatively unimportant.

VI

It being established that there is a strong and specific First Amendment interest in editorial advertising and that the policies discriminatorily barring such expression work a *prima facie* violation of constitutional principles, we must consider the countervailing considerations raised by the Commission and the broadcaster-intervenors. In order to justify the policy at issue, they must show some very substantial harm that would be caused by acceptance

[49] [Continued]

"* * * A lumber company may advertise its wood products, but a conservation group cannot implore citizens to write to the President or Governor about protecting our natural resources. An oil refinery may advertise its products, but a citizens' organization cannot demand enforcement of existing air pollution statutes. An insurance company may announce its available policies, but a senior citizens' club cannot plead for legislation to improve our social security program."

[49] *See generally* C. WAXMAN (ed.), THE END OF IDEOLOGY DEBATE (1969).

of editorial advertising—a sort of harm great enough to override the First Amendment interests at stake and a sort of harm not already involved in the acceptance of commercial and "noncontroversial" advertising. Only such a showing could convince us that the ban on editorial advertisements is supported by sufficient countervailing values and is not based solely on the content of the ideas conveyed.

The Commission and intervenors have begun from the assumption that our holding for petitioners would deprive broadcast licensees of their highly prized editorial independence and control over their frequencies, giving editorial advertisers a *right* to air time which commercial advertisers do not presently have. They have argued that petitioners seek the right to "grab the mike" from broadcasters' hands.[50] The result, they say, would be a threefold disaster. First, they foresee " 'a return to the chaotic situation of radio's early days' " [51] when too many hands grabbing for too few mikes made successful broadcasting impossible. Second, they argue that compulsory acceptance of editorial advertising would allow a few rich individuals or groups to buy up great blocks of time to purvey views on only one side of important issues, thus grossly unbalancing the broadcast station's treatment of those issues. And third, they point out that broadcasters compelled to accept editorial advertisements on one side of an issue would then be required by the fairness doctrine to accept at least some advertisements on the other side —free of charge if necessary. Provision of such free advertising time, they say, would cut into the broadcasters' revenues and might bring financial collapse.

The arguments of the Commission and intervenors fall well short of the mark. The reason is that they have

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[50] Statement of attorney for intervenor Columbia Broadcasting System at oral argument before this court.

[51] Brief for the Commission in Case No. 24,537 at p. 12.

apparently misunderstood the narrowness of the issue here. All that we are considering is the permissibility of a total, flat ban on editorial advertising. All petitioners ask is that broadcasters be required to accept *some* editorial advertising. They do not advocate an absolute right to air their advertisements. As the *Red Lion Court* made clear, there could not be any such absolute right because advertising time, like all broadcast time, is severely limited. *See* text at page [A-21] *supra.* Under the Communications Act, broadcasters are not "common carriers" obliged to accept any advertising message that is submitted.[52] And petitioners do not argue that they should be. What petitioners do argue is that editorial advertisements should at least be considered and that some should be aired.

Such a modest reform would not substantially undermine broadcasters' editorial control over their frequencies. For broadcasters would retain full latitude to control the content of their programming. Their editorial control over non-advertising time would not be disturbed whatever. All that would be affected is their allocation of advertising time—an area in which *editorial* control over content has never been of major importance. The interest in deciding which advertisements to accept is not as great as in deciding what public issues to cover and how to cover them on news presentations, for example. *See* text at page[s] [A-18 - A-19], *supra.* It surely cannot be

[52] 47 U.S.C. § 153(h) (1964). The Commission and intervenors argue that this "common carrier" provision would be declared unconstitutional if we were to decide for petitioners in these cases. That, of course, is absolutely incorrect. The Commission and intervenors also point to a part of the Communications Act providing that if a station permits one candidate for office to use its facilities, it must then permit others equal time, but providing also that "[n]o obligation is imposed upon any licensee to allow the use of its station by any such candidate." 47 U.S.C. § 315(a) (1964). This statutory provision squares perfectly with our holding that a broadcaster is not necessarily obliged to provide any time for advertisements, but that if he does sell some advertising time he may not totally exclude editorial advertising.

equated, as the Commission and intervenors suggest, with the interest of law review editors in deciding what articles to publish. *See Avins* v. *Rutgers, State University of New Jersey*, 3 Cir., 385 F.2d 151 (1967), *cert. denied*, 390 U.S. 920 (1968). A broadcaster traditionally is not nearly as involved in the preparation and editing of advertisements as a law review staff is in the preparation and editing of articles.

Within the affected block of advertising time, neither chaos nor anything approaching chaos would follow the modest reform at issue. For, again, broadcasters would retain wide-ranging control. It is well established in First Amendment law governing access to forums that "reasonable regulations" may be promulgated and enforced to limit the exercise of free speech.[53] At the least, there may be regulations determining the time, place and manner of speech. They may not be used to stifle speech, but they are absolutely necessary to see that too many groups speaking at once do not drown out one another or trench overly much on the normal uses to which the forum is put by the public in general. The same principle applies to broadcasters' methods for allocating advertising time. All that petitioners condemn here are regulations providing that public issue advertising may be aired "at no time, in no place and in no manner" over the broadcast media.

Clearly, for example, broadcasters are entitled to place an outside limit on the total amount of editorial advertising they will sell. To fail to impose some such limit would be to deny the public the other sorts of programming which it legitimately expects on radio and television. Similarly, "reasonable regulation" of the placement of advertisements is altogether proper. No advertiser has a right to air his presentation at any particular point

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[53] *See, e.g., Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 320 (1968); Note, *supra* Note 15.

in an evening's programming. Nor does he have a right to clog a particular time segment with his messages. A relegation of all editorial advertising to non-"prime time" or any other major discrimination in the placement of editorial advertisements would no doubt go too far. But there is still room for broad exercise of the broadcasters' discretion.

We need not define the precise control which broadcasters may exercise over editorial advertising. Rather, the point is that by requiring that *some* such advertising be accepted, we leave the Commission and licensees broad latitude to develop "reasonable regulations" which will avoid any possibility of chaos and confusion. The spectre of chaos and "mike grabbing" raised by the Commission and intervenors here is, as petitioners say, a "bogus issue." Broadcasters, after all, have dealt quite successfully with the scheduling problems involved with commercial advertising. We require only that noncommercial advertisers be treated in the same evenhanded way. Although many broadcasters already do allow editorial advertisements on the air, we have not been shown one reason, drawn from their experience, to suggest that chaos has resulted.

Beyond the mistaken suggestion of administrative apocalypse, the Commission and intervenors have raised a more plausible and important claim, involving the danger that a few individuals or groups might come to dominate editorial advertising time. Of course, the mere fact that wealthy people may use their opportunities to speak more effectively than other people is not enough to justify eliminating those opportunities entirely. It takes more money to operate a magazine or newspaper—or, for that matter, a broadcast station—than to buy a segment of time for an editorial advertisement. Yet we are not reluctant to provide strict First Amendment protection for the operators of magazines, newspapers and broadcast stations. The real problem, then, is not that editorial ad-

vertising will cost money, but that it may be dominated by only one group from one part of the political spectrum. A onesided flood of editorial advertisements could hardly be called the "robust, wide-open" debate which the people have a right to expect on radio and television.

Again, however, invalidation of a flat ban on editorial advertising does not close the door to "reasonable regulations" designed to prevent domination by a few groups or a few viewpoints. Within a general regime of accepting *some* editorial advertisements, there is room for the Commission and licensees to develop such guidelines.[54] For example, there could be some outside limits on the amount of advertising time that would be sold to one group or to representatives of one particular narrow viewpoint. The licensee should not begin to exercise the same "authoritative selection" in editorial advertising which he exercises in normal programming. *See* text at pages [A-22 - A-23] *supra*. However, we are confident of the Commission's ability to set down guidelines which avoid that danger.

We are no less confident of its ability to deal reasonably with the final problem it has raised—that relating to licensees' fairness obligations. Invalidation of a flat ban on editorial advertising, of course, leaves the Commission the power to require that if editorial advertisements are accepted on one side of an issue, then broadcasters must also accept at least some advertisements on the other side of the issue, free of charge if necessary. *See Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963). The result of such a reasonable regulation, however, need not be financial disaster. Indeed, it is incredible that the Commis-

[54] In the context of regulating demonstrations or picketing, guidelines which limit access because the same or similar groups had already had substantial access would be unusual and perhaps impermissible. However, the interest in maintaining some degree of balance on the broadcast media is particularly great. And "the characteristics of news media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co. v. F.C.C.*, *supra* Note 7, 395 U.S. at 386.

sion would enforce a rule so rigid that licensees would be driven out of business.[55] If the obligation to provide some free time for answering editorial advertisements were shown to threaten actual financial harm to particular broadcasters, the Commission could make necessary adjustments.[56]

We conclude that none of the spectres raised by the Commission and intervenors—spectres of chaos, grossly unbalanced programming and financial disaster—is enough to justify a flat ban on editorial advertising. What real problems there are may be dealt with while the acceptance of *some* editorial advertisements is required. The keynote must be a scheme of reasonable regulation, administered by the licensee and guided by the Commission. At least in the past, the Commission has not considered this task so impossible. Twenty-five years ago it decided a case in which a union charged that a broadcaster was violating free speech rights by refusing to sell program time for the airing of controversial views. The Commission stated:

> "* * * The spirit of the Communications Act of 1934 requires radio to be an instrument of free speech, subject only to general statutory provisions imposing upon the licensee the responsibility of operating its station in the public interest. * * *
>
> "* * * No single or exact rule of thumb for providing time, on a non-discriminatory basis, can be

[55] We note that the Commission's requirement of free time for antismoking was administered generously toward the financial concerns of licensees and, indeed, few broadcasters seem to have been deterred from accepting cigarette commercials as a result. *See National Broadcasting Co., Inc.*, 16 F.C.C.2d 947 (1969).

[56] *See* Note, *Fairness Doctrine: Television as a Marketplace of Ideas*, 45 N.Y.U. L. REV. 1222, 1249 (1970). We must be somewhat skeptical of the talk about financial disaster. For, according to Commissioner Johnson, television broadcasters at least "*average* a 90 to 100 percent return on tangible investment annually." N. JOHNSON, HOW TO TALK BACK TO YOUR TELEVISION SET 65 (1969). (Emphasis in original.)

> stated for application to all situations which may arise in the operation of all stations. The Commission, however, is of the opinion that the operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues and that only charitable organizations and certain commercial interests may solicit memberships is inconsistent with the concept of public interest * * *. The Commission recognizes that good program balance may not permit the sale or donation of time to all who may seek it for such purposes and that difficult problems calling for careful judgment on the part of station management may be involved in deciding among applicants for time when all cannot be accommodated. However, competent management should be able to meet such problems in the public interest and with fairness to all concerned. The fact that it placed an arduous task on management should not be made a reason for evading the issue by a strict rule against the sale of time for any programs of the type mentioned."

United Broadcasting Co., 10 F.C.C. 515, 517-518 (1945). We agree with those views, and see no reason why the Commission and broadcast licensees should be any less competent in 1971 than they were in 1945. Given a scheme of reasonable regulation, there is no reason why acceptance of editorial advertising should cause any substantial harm or disruption not already involved in the acceptance of other advertising. Therefore, to single out and exclude editorial advertising is to violate the First Amendment of the Constitution.

VII

On the basis of the foregoing, we reverse the Commission's decision that a flat ban on all editorial advertising is permissible. However, we remand these cases to the Commission for further consideration. On remand, the Commission should develop reasonable regulatory guidelines to deal with editorial advertisements. Petitioners

should be allowed to reapply for advertising time; and, unless their presentations are found to be excludable under the Commission's guidelines, their applications should be accepted. Since the issues on which BEM and DNC seek to speak are current and changing, it is essential that regulations be developed speedily and that the affected broadcasters pass promptly upon petitioners' applications to buy time.

In the end, it may unsettle some of us to see an anti-war message or a political party message in the accustomed place of a soap or beer commercial. But we must not equate what is habitual with what is right—or what is constitutional. A society already so saturated with commercialism can well afford another outlet for speech on public issues. All that we may lose is some of our apathy. That is a small price to pay. For, as the Supreme Court has said, "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949).

Reversed and remanded.

McGOWAN, *Circuit Judge, dissenting*: The majority do not hold that petitioner in No. 24,492 is entitled to have its proposed spot announcements carried by the intervenor-licensee there involved, or that the petitioner in No. 24,537 is assured of being able to buy time for its programs on public issues. What is held is that the Constitution commands that "*some*", but not all, editorial advertising be accepted; and the Commission is directed to embark upon rulemaking to determine how a licensee is to differentiate the "*some*" from the all.

The majority appear to believe that this assignment will not prove difficult. I am not so sure, particularly when I note that the only Commissioner who has perceived the same constitutional requirement as the majority responds to the practical problems by suggesting that sales of a significant proportion of the total broadcast time be made on a first-come, first-served basis, accompanied by a possible suspension of the fairness doctrine. That approach does not seem to me a promising one in terms of the public's right to know.

The difficulties derive, of course, from the physical peculiarity which distinguishes radio and television communication from all other forms, namely, the limited number of frequencies and the impossibility of accommodating all who may wish to be heard over them. This, so the Supreme Court has said in *Red Lion*, makes it "idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of each individual to speak, write or publish." The majority, in recognition of this fact, do not purport to discern other than an "abridgeable" or "limited" First Amendment right to initiate paid editorial advertising. Petitioners themselves, it is said, may conceivably never be able to insist that their particular advertising be accepted. That will depend upon the rules which the Commission propounds.

The Commission has, at the least, been set a task of heroic proportions, and one whose very complexities may undermine the premise upon which it is founded. The question is whether the Constitution requires that it be undertaken. I am not convinced that it does. It is presently the obligation of a licensee to advance the public's right to know by devoting a substantial amount of time to the presentation of controversial views on issues of public importance, striking a balance which is always subject to redress by reference to the fairness doctrine. Failure to do so puts continuation of the license at risk—a sanction

of tremendous potency, and one which the Commission is under increasing pressure to employ.

This is the system which Congress has, wisely or not, provided as the alternative to public ownership and operation of radio and television communications facilities. This approach has never been thought to be other than within the permissible limits of constitutional choice. Its existence provides a mechanism for implementation of the public's right to know which, by and large, has been effective. Indeed, the loudest voices in criticism of it complain that it has been working too well for the comfort of governmental policy makers in the areas of greatest current concern.

It is hardly the path of wisdom to scrap it for a system in which money alone determines what issues are to be aired, and in what format, even assuming, as is likely to be the case, that those issues, whatever they may prove to be, compare favorably with the intellectual content of the great bulk of commercial advertising. The responsibility for informing the public is now squarely on the licensee. That responsibility will only be diluted and obscured by requiring the licensee, against his own better judgment, to accept paid editorial advertising. I do not think the First Amendment requires that result, at least not within the context of a regulatory scheme which has made provision for the airing of controversial issues of public importance.

Of course it is true that licensees are currently free to accept paid editorial advertising, and some do, subject always to the limitations of the fairness doctrine. It may well be that a detailed inquiry and investigation by the Commission of this area, by formal rulemaking or otherwise, would be both useful and consonant with the Commission's continuing obligation to see to it that the public interest obligations of the licensees are being met in the most effective way. The Commission's currently announced purpose to undertake a comprehensive and wide-

ranging review of the operation of the fairness doctrine might well include the subject of paid editorial advertising. But, believing as I do that the First Amendment exerts no compulsion to the contrary, I would not order the Commission to undertake that review in a constitutional strait jacket which dictates the result in advance.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1970

No. 24,492

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC., INTERVENOR

No. 24,537

DEMOCRATIC NATIONAL COMMITTEE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING CO., INC., INTERVENOR,
COLUMBIA BROADCASTING SYSTEM, INC., INTERVENOR

Petitions for Review of Orders of the Federal Communications Commission

Before: Wright, McGowan and Robinson, Circuit Judges.

B 2

JUDGMENT

These cases came on to be heard on the records from the Federal Communications Commission, and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the orders of the Federal Communications Commission on review herein are hereby reversed and the cases are remanded to the Federal Communications Commission for further proceedings in accordance with the opinion of the Court filed this date.

Per Curiam

For the Court:
Nathan J. Paulson
Clerk

Dated: August 3, 1971

Opinion by Circuit Judge Wright
Separate dissenting opinion by Circuit Judge McGowan

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1971

No. 24,492

BUSINESS EXECUTIVES' MOVE FOR
VIETNAM PEACE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
INTERVENOR

No. 24,537

DEMOCRATIC NATIONAL COMMITTEE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING CO., INC., INTERVENOR,
COLUMBIA BROADCASTING SYSTEM, INC., INTERVENOR

Before: Wright, McGowan and Robinson, Circuit Judges.

ORDER

On consideration of the petitions for rehearing filed by Post-Newsweek Stations, Capital Area, Inc., American

Broadcasting Companies, Inc., the United States of America and Federal Communications Commission, and Columbia Broadcasting System, Inc. for rehearing, and of the brief of *amicus curiae* National Broadcasting Company, Inc. in support of the petitions for rehearing, it is

ORDERED by the Court that the aforesaid petitions for rehearing are denied.

Per Curiam

October 4, 1971

APPENDIX D

F.C.C. 70-861

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

IN RE DEMOCRATIC NATIONAL COMMITTEE,
WASHINGTON, D. C.

Request for Declaratory Ruling Concerning
Access to Time on Broadcast Stations

MEMORANDUM OPINION AND ORDER

(Adopted August 5, 1970; Released August 12, 1970)

BY THE COMMISSION: COMMISSIONER COX CONCURRING AND ISSUING A STATEMENT; COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT.

BACKGROUND—REQUEST AND PLEADINGS

1. On May 19, 1970, the Democratic National Committee (DNC) filed with the Commission a request that the Commission issue a declaratory ruling that

"A broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues." [1]

2. DNC seeks a declaratory ruling on these matters because of its desire to purchase time on individual broadcast stations and networks for the purpose of presenting programs and spot announcements of varying duration, some of which would be devoted to the solicitation of funds while others may contain comment on va-

[1] Comments with respect thereto were filed by the American Broadcasting Company (ABC) on June 11, 1970 and by the Columbia Broadcasting System (CBS) on June 22, 1970 and a statement by the National Broadcasting Company (NBC) was filed on June 22, 1970.

rious controversial issues of public importance. The campaign envisioned will, according to DNC, require the expenditure of "thousands of dollars" and thus it seeks assurance that it will be able "to obtain the access to the broadcast media which implementation of the plan demands." It appears that in the latter part of March, 1970, CBS rejected a request by DNC to purchase one-half hour of prime time for the presentation of an issue—oriented program which would have included an appeal for contributions to the Democratic Party. It is said that CBS' position at that time was that it would sell time for political purposes only during election campaigns. DNC also approached NBC and was told that that network would make available prime time for purchase by the Committee for a program presenting the views of the party on important public issues and including a solicitation of funds for the party. It is not clear that DNC approached the ABC network in view of the latter's alleged general policy against solicitation of funds other than for charity and with network approval. By reason of the foregoing and the alleged common policy of individual broadcast stations to decline to sell time for spot announcements or programs for the broadcast of views on controversial issues of public importance or for the solicitation of funds, DNC states that its problem—access to broadcast licensees for the presentation of its programs—can be resolved only through the issuance of the blanket declaratory ruling described in paragraph 1, *supra*.

3. We believe that the policy matters raised by DNC are, to a substantial extent, appropriate for consideration and that a full statement of our views will provide helpful general guidance for the public and Commission licensees. We, however, do not believe that all of the various matters raised by DNC are susceptible to the declaratory order sought and we cannot at this juncture rule upon every conceivable factual situation which may arise.

4. In support of its request, DNC has set forth some pertinent financial considerations of present-day political campaigning and the development of a narrow rather than a broad-based financial support of political parties.[2] DNC contends that access to mass media, particularly radio and television, is necessary to attract the attention and seek the support of potential small political contributors. It is only in this way, DNC contends, that a healthy political system can function. DNC urges that its proposed broadcast campaign should not be precluded by a variety of differing station and network policies and that the question of access to broadcast media for responsible groups should be subject to a uniform national policy. The arguments advanced by DNC are based upon constitutional, statutory and public policy grounds.

5. The constitutional argument advanced by DNC is essentially that the Supreme Court's decision in *Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, 395 U.S. 367 (1969) reaffirmed the public's First Amendment right to hear contrasting views on issues of public importance and "employed language that would extend to members of the public the right of access to broadcast facilities." DNC argues that the network policies of ABC and CBS represent arbitrary barriers to broadcast facilities contrary to the law as expressed in *Red Lion, supra.* DNC suggests that under the *Red Lion* standard reasonable restrictions by broadcasters are permissible—e.g., limitation of use of broadcast facilities to responsible spokesmen and protec-

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[2] For example, in 1968, $90 million was expended on political use of radio and television (equaling about 1/3 of the total expenditure on political campaigning for the year). See Alexander and Myers, *A Financial Landslide for the GOP*, Fortune. March 1970. pp. 104, 189. Another indicative statistic is the fact that in 1956, only 40% of the contributions to the Democratic Party exceeded $500 whereas the figure had increased to almost 80% in 1968. According to DNC the narrowing of the political contribution base can result in a dangerous concentration of the sources of revenue in special interest groups which, in turn, threatens the entire democratic process.

tion against use of facilities for libelous presentations or those in bad "taste."

6. According to petitioner, the overriding public policy consideration requiring the declaratory ruling is that the public airwaves—the most powerful communications medium in our society—which are used to solicit funds for "soaps, brassieres, deodorants and mouthwashes" should be utilized to solicit funds to enhance the exchange of ideas. DNC contends that regardless of whether the Commission issues the declaratory ruling requested, the refusal of a broadcaster to sell time to DNC should be evaluated adversely to such broadcaster at time of renewal. The reason for this, DNC urges, is the importance of the broadcast media to political expression (*Farmers Ed. and Coop Union* v. *WDAY*, 360 U.S. 525, 529-30 (1959)); the public interest consideration inherent in broadcasters making time available for political broadcasts (*Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 20 RR 1901 (1960)); the Commission's prior holding that an arbitrary limitation of coverage of an election campaign prior to the campaign was contrary to the public interest (Citing *Homer R. Rainey*, 3 RR 737 (1947); *City of Jacksonville*, 12 RR 113, 180j (1959); and *Loyola University*, 12 RR 1017, 1099 (1956)) and that the Commission's ruling in *Women's Strike for Peace* (letter of November 22, 1965) predates *Red Lion* and, to the extent it conflicts with that decision, is no longer controlling. Finally, DNC notes that it is seeking not a ruling which would require a broadcaster to accept particular programs or announcements, but only that broadcasters may not establish arbitrary barriers to access by responsible groups, such as DNC, contrary to the First Amendment and *Red Lion*, *supra*, or that the establishment of such barriers is contrary to the public interest.

7. *Response of the Networks:* In response to the DNC request, American Broadcasting Companies, Inc. (ABC)

submitted portions of its "standards and policies" (The complete version has been filed in BAL-5733, Exhibit I-B, Attachment B, Section III). ABC recites its standards relating to solicitation connected with appeals for charity (no solicitation without specific permission of ABC) and appeals related to religious broadcasts (solicitation permitted in prescribed manner not here relevant), but states that its policy is not to sell time for solicitation of funds in other situations, absent special public interest considerations. It is ABC's judgment that DNC's request is concerned with "the continued strength and viability of our two party system" and is thus a "special public interest consideration" justifying an exception to its normal policy of not selling time for solicitation purposes.

8. ABC states that with respect to controversial issues of public importance, there are "dozens" of "responsible entities" who would wish to purchase time to present their views "were we to open the door." ABC contends that it would be "reasonable to anticipate a flood of such requests." Thus, ABC states, it will adhere to its general policy against the sale of time for controversial issue programs and announcements. However, ABC under its "special public interest consideration" standard would ". . . be prepared, consistent with its other obligations, to accept such orders for time from major political parties as can be accommodated on a reasonable basis."

a. CBS' lengthy response to the DNC complaint advances three major arguments: (1) that DNC has misunderstood CBS' policies relating to presentation of controversial issues and that CBS' policies insure full and fair presentation of such issues; (2) that a regulatory policy which imposes common carrier obligations on broadcasters would be contrary to the public interest; (3) that there is no constitutional or statutory right to compel broadcasters to carry the DNC programs; and, (4) that such obligation would be contrary to the Communications Act and Commission precedent.

9. With respect to the first major argument, CBS argues that DNC has not alleged violation of the fairness doctrine but rather seeks to take presentations of controverial issues away from the control and supervision of the licensee. CBS states that if licensees were required to permit the purchase of air time for the presentation of views on controversial public issues, the nature of broadcasting would be radically altered to the detriment of fair, objective and balanced information available to the listening public.[3] CBS has followed a policy of refusing the sale of broadcast time for presentations of controversial issues in favor of providing "significant opportunities" for such discussions without charge to proponents of various viewpoints through news and information broadcasts. To sell time for presentations on public issues, argues CBS, would result in the preemption of the limited broadcast frequencies by those with strong financial resources which would "necessarily distort the manner in which issues were presented" to the public. CBS asserts that under its present policies, it provides a "high proportion of direct presentations of views" by "the actors in the events of the day" and thus, aside from fully informing the public of differing viewpoints on controversial issues, also provides an opportunity for those holding differing viewpoints to present their own views. These direct presentations, CBS notes, are part of its overall effort to inform the public fully and fairly and

[3] CBS asserts that it has served the public by presenting issues and viewpoints within a balanced program schedule utilizing newsworthiness as the sole criterion. CBS emphasizes the growth of public affairs and news presentations during the 1968-69 v. 1956-57—e.g., total hours of news and public affairs broadcasting—1,354 v. 675; prime presentations—192 v. 34; regularly scheduled hard news 6:00 p.m.—11:00 p.m., 338 v. 130; and total hours of news documentaries 100 v. 37. In addition, CBS also presents a comprehensive exhibit to demonstrate the coverage given one of the major issues of the day by CBS and WCBS-TV—the Indochina War and domestic reaction to it. This Indochina exhibit includes a minute and second analysis of CBS' total coverage of this issue and runs over 100 pages.

are not permitted to become an instrument of "partisan advocacy." The First Amendment, CBS argues, is primarily concerned with the right of the public to be informed—as opposd to the right of the public to speak or to be heard.

10. CBS' policy against sale of time for the presentation of views on controversial issues does not apply to broadcasts on behalf of political candidates or ballot propositions. This exclusion is based upon CBS' belief that the intent of Section 315 is to facilitate the discussion of political issues by legally qualified candidates; such political broadcasts may include a direct appeal for funds so long as CBS is not involved in the collection or handling of such funds. CBS also states its intention to permit the purchase of a special category of spot announcement (up to one minute in length) for the purpose of political fund raising which need not be on behalf of political candidates or ballot propositions.

11. With respect to the common carrier argument, CBS states that such a policy would be contrary to the public interest because partisan presentations would diminish the time available for other news, sports and entertainment programs and would result in an "auction" to the highest bidder to determine what issues will be discussed and how such discussion will be conducted. Moreover, CBS queries, would the broadcaster then be responsible for restoring the balance? How would a network choose among competing bidders if not enough time were available for all? What standard is to be used to determine "responsible entities?" CBS argues that DNC's proposal would divest the licensee of responsibility for controversial issue programming and would ultimately require the Commission to make judgments as to the specific programs which are presented or rejected.

12. The legal arguments which CBS advances—i.e., that DNC's request is without constitutional or statutory

basis, that Commission compulsion to carry DNC's programs is barred by the Communications Act, and that the action which DNC requests of the Commission is contrary to the Commission's own policy and precedent—are based primarily upon the assertion that no particular person or group has the right to speak over broadcast facilities and that to assert such a right would ultimately require the Commission to assume the role of a censor or arbitor of specific programs, contrary to its long-established policy of avoiding such governmental involvement. CBS asserts that the *McIntire* case[4] stands for the proposition that "broadcasters, though licensed by the Commission and subject to its valid regulations, are not publicly owned facilities, and there is no First Amendment right to purchase time on radio or television stations." CBS further asserts that nothing in *Red Lion*[5] indicates that *McIntire* is no longer good law or that, apart from Section 315, there is any legal obligation for broadcast licensees to sell time. Rather, CBS says, *Red Lion* merely sustained long-standing Commission policies which are wholly inconsistent with DNC's request.

13. To accede to DNC's request, CBS argues, would violate Sections 3(h) and 326 of the Communications Act, which taken together establish that the licensee—not the Commission—is to exercise the power of program selection. The right of *personal* reply to material previously selected for broadcast is limited to equal opportunity for political candidates, replies to personal attacks and replies to station political endorsements. CBS contends that the legislative history of the Communications Act supports its assertion that the statutory scheme envisions a system in which the broadcaster is left with the initiative of assuring that programs presented are in the public interest.

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[4] *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F.2d 597 (3rd Cir. 1945) *cert. den.* 327 U.S. 779 (1946).

[5] *Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, 395 U.S. 367 (1969).

14. Finally, CBS asserts, DNC's request is "fundamentally inconsistent" with the concept of licensee responsibilities and specifically, contrary to the Commission's prior holdings that "the Commission has no power to require a broadcaster to carry or refrain from carrying any particular program, or to prescribe the content of any program presented over the air." Letter to *Women's Strike for Peace*, November 22, 1965.[6] Nothing in the *Red Lion* decision, *supra*, states CBS, indicates that the Court contemplated the abandonment of "traditional FCC fairness policies" and the adoption by the FCC of a common carrier theory as set forth in the DNC request.

15. NBC has no policy which would prevent the purchase of program time envisioned by DNC or the solicitation of funds for the party during such a program. DNC states that it is not clear whether NBC would permit short spot announcements designed for the solicitation of funds for a party, but this simply points up the desirability of a concrete factual situation—namely, of DNC making a specific request, instead of the general, more vague approach which it has taken here.

DISCUSSION

Part I. The right of responsible entities to purchase time for comment on public issues

16. The DNC petition raises two separate questions: (i) the asserted right of political parties to purchase broadcast time to solicit funds, and (ii) the asserted right of responsible entities to purchase time for comment on public issues. In this Part I, we deal with the second question.

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[6] To support this proposition, CBS also cites *McIntire* v. *Wm. Penn Broadcasting Co., supra;* 1949 *Editorilizing Report*, 13 FCC 1246; 1960 *Report and Statement of Policy in the En Banc Programming Inquiry*, 25 Fed. Reg. 7291 (August 3, 1960); and letter to *Judy Collins*, March 24, 1970.

17. That question goes to the heart of the system of broadcasting which has developed in this country—i.e., the licensing of private entities under the public interest standard. While the issues raised by the DNC petition are fundamental, they are not open. They have long been settled adversely to the DNC position, by the statute, by the Commission, and by the Courts. We shall discuss the present system and its statutory support, the relevant precedents, and the policy considerations.

18. The system which Congress has evolved has been described in full in the landmark decisions in this field—*NBC* v. *U.S.*, 319 U.S. 190 (1943), and *Red Lion Broadcasting Co. Inc.* v. *F.C.C.*, 395 U.S. 367 (1969). We shall not repeat that discussion here. It is sufficient to note that it is based upon the unique nature of radio—that "unlike other modes of expression, radio inherently is not available to all. Because it cannot be used by all, some who wish to use it must be denied." (*NBC* v. *U.S.*, *supra*, at 226.)[7] To resolve the chaotic situation which had resulted, Congress decreed a system of licensing private entities for short terms, upon the condition that their operations serve the public interest. It is thus incumbent upon these public trustees to fashion schedules which do meet the needs and interests of the public. To do so, the broadcaster must allocate programming among the several categories (e.g., entertainment, instruction, news, public affairs) and, within those categories, must choose among the many competing requests for air time. See *Report on Editorializing*, 13 FCC 1246, 1247-48 (1949). However, there is one special obligation which the Commission has stressed—that broadcasters must ". . . devote a reasonable percentage of their broadcast time to

[7] The Court recently reaffirmed this vital distinction in *Red Lion* (*supra*, at 388): "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish."

the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station" (*id.* at p. 1249). Indeed, the Commission has stressed that it has allocated so much spectrum space to broadcasting, basically because of the great contribution which broadcasting can make to an informed public opinion on the vital public issues of the day. *Ibid., Storer Broadcasting Co.*, 11 FCC 2d 678. It follows that the Commission can and must require the achievement of that allocation purpose by its broadcast licensees. See Section 303(b); *Red Lion Broadcasting Co. Inc.* v. *F.C.C., supra* at p. 394. In short, as stated by the Court in *Red Lion, supra*, at p. 394, the licensee is ". . . given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern."

19. The Commission has consistently made clear that with some exceptions not here pertinent, the licensee has discretion in discharging that obligation. Thus, in its basic *Editorializing Report*, the Commission stated:

> It should be recognized that there can be no one all-embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other

> available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request . . . .

This same policy is set out in the Commission's 1964 *Fairness Primer*, 29 Fed. Reg. 10415, 10416; cf. also 1960 *Programming Statement*, 25 Fed. Reg. 7291 (1960). In line with these general precepts, we have consistently held, in case after case, that with certain exceptions not here involved, no individual has a right to express his particular views by means of a broadcast facility.[8]

20. While the licensee thus has considerable discretion in discharging "the twofold duty" stated in *Red Lion, supra*, at 377—to devote a reasonable amount of time to public issues and to do so fairly—that discretion must be exercised consistent with the public interest standard. The most basic consideration in this respect is that the licensee cannot rule off the air coverage of important issues or views because of his private ends or beliefs. As a public trustee, he must present representative community views and voices on controversial issues which are of importance to his listeners (*Red Lion, supra*, at 389, 390, 394). This means also that some of the voices must be partisan. A licensee policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner would run counter to the "profound national commitment that debate on public issues should be uninhibited, robust, and wide-open." *New York Lines Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); see also *Red Lion Broadcasting Co. Inc.* v. *F.C.C.*, 395 U.S. 367, 392 (n. 18) (1969); *Storer Broadcasting Co.*, 11 FCC 2d 678 (1968); *Anti-Defamation League of B'nai B'rith*, 9 FCC 2d 190, 191 (1966), affirmed *Anti-Defamation League* v.

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[8] *Dowie A. Crittenden*, 18 FCC 2d 499 (1969); *Mrs. Margaret Z. Scherbina*, 21 FCC 2d 141 (1969); *Democratic State Central Committee of California*, 19 FCC 2d 833 (1968); *Boalt Hall Student Association*, 20 FCC 2d 612 (1969); *Mrs. Madalyn Murray*, 40 FCC 647 (1965).

F. C. C., 403 F. 2d 169, 170 (1968) (C.A.D.C.), *cert. den.* 394 U.S 930 (1969). In sum, as stressed in the *Editorializing Report, supra*, at p. 1249:

> It is this right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

See *Red Lion Broadcasting Co. Inc.* v. *F.C.C., supra*, at p. 390:

> It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here.

21. With this as background, we turn to the DNC petition. That petition seeks to overrule the above policy and to require licensees to sell time to any responsible entity to comment on a public issue. Using the CBS response as an example, we note that it would require a holding that CBS' policy in this area is inconsistent with the public interest, because although it recognizes its obligation to devote a reasonable amount of time to controversial issues of public importance (and has submitted a showing of its increasing efforts in this respect, including during prime time hours), and to do so fairly by providing ". . . significant opportunities for such [broadcast] discussion without charge to partisans of various viewpoints in [its] news and information broadcasts" (p. 3, CBS Response), CBS will not sell time for the expression of viewpoints on public issues (with the exception of political broadcasts). It is important to bear in mind that DNC has not alleged that CBS or any other licensee has failed to discharge the above-noted obligations of the fairness doctrine. Thus, what is involved in the DNC request is a question whether there is a right of access to broadcast facilities by "responsible entities" over and

> available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request . . . .

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21. With this as background, we turn to the DNC petition. That petition seeks to overrule the above policy and to require licensees to sell time to any responsible entity to comment on a public issue. Using the CBS response as an example, we note that it would require a holding that CBS' policy in this area is inconsistent with the public interest, because although it recognizes its obligation to devote a reasonable amount of time to controversial issues of public importance (and has submitted a showing of its increasing efforts in this respect, including during prime time hours), and to do so fairly by providing ". . . significant opportunities for such [broadcast] discussion without charge to partisans of various viewpoints in [its] news and information broadcasts" (p. 3, CBS Response), CBS will not sell time for the expression of viewpoints on public issues (with the exception of political broadcasts). It is important to bear in mind that DNC has not alleged that CBS or any other licensee has failed to discharge the above-noted obligations of the fairness doctrine. Thus, what is involved in the DNC request is a question whether there is a right of access to broadcast facilities by "responsible entities" over and

beyond the fairness doctrine right of the public to be informed.

22. The DNC position—that the licensee, upon request, must sell time to any responsible entity for comment on public issues—runs counter to the statutory language and the legislative history. That history shows that Congress specifically debated and rejected the idea of the licensee being required to act as a common carrier with respect to transmission of comment on public issues. See Sen. Rep. No. 772, 69th Cong., 1st Sess., p. 4; 67 Cong. Rec. 5560-5561, 12501-12504. The Act reflects this. Section 3(h) states that a broadcaster shall not be deemed a common carrier. Section 315(a) sets out the pertinent statutory standard—that the licensee must operate in the public interest and must afford reasonable opportunity for the discussion of conflicting viewpoints on controversial issues of public importance. This language cannot be squared with the DNC position; had Congress adopted such a position, the statutory prescription would have been entirely different (e.g., . . . "including the sale upon request of time to responsible entities for presentation of a viewpoint on controversial issues of public importance"). The legislative history makes clear that the language of Section 315(a) is a "restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934" (H. Rep. No. 1069, 86th Cong., 1st Sess., p. 5 (1958)—that is, as the legislative history shows, the principles set forth in the basic *Editorializing Report*. That this is the statutory scheme is further shown by the consideration of the second sentence of Section 315(a)—that "no obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate." The purpose of this provision is to make clear that the broadcaster is not a common carrier as to political broadcasts—that he may exercise discretion as to the time to be afforded broadcasts by candidates. See *Memorandum of F.C.C.*, Hear-

ings before the House Subcommittee of the Interstate and Foreign Commerce Committee, 88th Cong., 1st Sess. on H. J. Res. 247, pp. 84-90 (1963) (to the effect that while the licensee has discretion, he cannot adopt a policy of not devoting a reasonable amount of time to political broadcasts). It would make no sense to hold that the licensee has discretion whether or not to sell time for the most important controversial issue programming of all—the political broadcast by the candidate (see discussion within as to the preferred position of such programming), but has no such discretion as to other controversial issue programs (e.g., by a candidate's supporters; by partisans of a particular viewpoint on some public issue).

23. The administrative and judicial precedents reflect the statutory scheme. The Commission's pronouncements are long established and consistent. See, e.g., *Report on Editorializing*, 13 F.C.C. 1246, 1249 (1949); 1960 *Programming Statement; Women's Strike for Peace*, November 22, 1965. The court cases are to the same effect. *McIntire* v. *William Penn Broadcasting Co.*, 151 F. 2d 597, 600-601 (C.A. 3), *cert. den.* 327 U.S. 779; *Massachusetts Universalist Convention* v. *Hildreth and Rogis Co.*, 183 F. 2d 497, 501 (C.A. 1). DNC argues that these cases are no longer relevant in light of the Court's decision in *Red Lion*, and that that decision establishes the correctness of its position. We do not so read *Red Lion*. The Government's brief pointed up the nature of the licensee's responsibility under the *Editorializing Report*, *supra*, at pp. 14-17, 31-32, and the Court recognized the report "as the principal summary of [the Commission's] *ratio decidendi* in cases in this area" (p. 1251). The Court at the outset noted "the twofold duty" imposed by the *Editorializing Report* and the manner in which the obligations under the general fairness request differed from those under the personal attack corollary (pp. 371-379).[9] The

[9] Thus, the Court stated: "These personal attack and political editorializing obligations differ from the general fairness require-

Court's decision is based, we believe, on this foundation. The thrust of that decision is not that the broadcast licensee is a common carrier, required to sell time to all comers on public issues, but rather that he is a public trustee—a proxy—who must present *representative* community views and voices on controversial issues. The Court's decision thus stresses the right of the public to be informed—not the right of the broadcaster or any individual or group to speak over broadcast facilities. The private censorship by broadcasters which the Court rules out is that which would prevent the presentation of representative community views or voices.

24. There are strong policy arguments in support of the Congresssional scheme. We have noted that broadcasting is inherently not open to all (paragraph 18, *supra*). That is true equally with respect to the common carrier access approach urged by DNC. The result could well be a return to the chaotic situation of radio's early days. Since the broadcast medium is a limited one, the amount of time to be devoted to public affairs—as against the other needs and interests of listeners—is also limited. This balance between the categories could be drastically skewed by a requirement that the broadcaster must make available time slots for the discussion of a controversial issue. Further, the public's agenda for discussion of public issues would then be set substantively and increasingly by the affluent—by the person or group which ". . . has the financial resources and interest to purchase sustained access to the mass communications media . . ." (*Banzhaf* v. *F.C.C.*, 405 F. 2d 1082 (C.A.D.C. 1968),

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ment that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attached party's side himself or choosing a third party to represent that side. But insofar as there is an obligation of the broadcaster to see that both sides are presented, and insofar as that is an affirmative obligation, the personal attack doctrine and regulations do not differ from preceding fairness doctrine." *Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, 395 U.S. at 378.

cert. den., 396 U.S. 842). Since the amount of broadcast time for discussion of controversial issues is limited and since the licensee must afford reasonable opportunity for discussion of both sides, the purchase of substantial blocks of time for a campaign by, say, the oil industry to discuss the issue of the oil depletion allowance would impose the burden to present reasonably the other viewpoint, and in turn would inevitably cut down on the amount of time for discussion of other issues. But we believe that such allocations of limited time are to be made on the basis of the *public* interest—not that of any private group, however powerful or affluent. Further, the public trustee would lose control over the important aspect of the manner in which the public is to be informed. We recognize that in some instances short spot announcements may serve a useful purpose in this area (see *infra*, p. 17). But we have also pointed up the limitations as to many issues of this manner of informing the public. See e.g., Hearings before the Senate Commerce Committee, H.R. 6543 (1969), pp. 142-143; *Voters Time Rept.*, p. 15. A licensee which reasonably made the judgment that an issue was too complex to be discussed in a 30-second commercial —that "hawking" the issue like a soap did not serve the public interest—would find that judgment frustrated by the DNC policy; it would be required to sell the spots and ordered to make time available to opponents on a similar basis. See *Cullman Broadcasting Co.*, 40 FCC 516 (1963); *KING Broadcasting Co.*, 10 FCC 2d 968, 970 (1967).

25. This last point—the application of *Cullman*—merits further discussion. The *Cullman* principle was developed to deal with the situation where the broadcaster has sold time to one side to present its views, has not presented or made plans to present the contrasting viewpoints, and rejects programming which he deems suitable to present those viewpoints, unless the party offering such programming will pay for its presentation. We held that the licensee could not properly insist upon payment in

such circumstances. The paramount public interest, we stressed, is the right of the public to be informed. The licensee has adjudged that an issue is of importance to its area by presenting the first viewpoint; that being so, the public's right to hear the other side cannot turn on whether the licensee received money.[10] This approach perfectly fits the public trustee concept. It does not fit a common carrier approach. For under the latter system, the licensee has to sell the time, no matter the amount, and then finds himself having to afford free time to the proponents of the contrasting viewpoint, again no matter what the effect on his ability to serve the public interest. Further, under a common carrier approach, each side is usually relegated to purchase, with no "*Cullman*" rights. We believe that *Cullman* is a correct and sound doctrine which ties in with the public trustee concept and best serves "the public interest in the larger and more effective use of radio" (Section 303(g)).

26. In connection with the above discussion, we should note that there is of course no Commission policy thwarting sale of time to comment on public issues. Licensees are free to do so, with the caveat that the fairness doctrine, including the *Cullman* aspect, must be observed. The critical issue is whether the licensee, to discharge either of "the twofold duties" noted at the outset—to devote a reasonable amount of time to issues of public importance and to do so fairly—must sell some time to comment on public issues. The foregoing discussion makes clear that the licensee need not do so. If, for example, CBS chooses not to sell time but rather to fulfill its obligation on a sustaining basis in the manner disclosed in paragraph 9, *supra* (e.g., to provide significant free opportunity for partisan presentations), that choice is within its discretion. What is crucial is that the licensee does meet its obligation "to operate in the public interest

[10] For the different application of *Cullman* to the political broadcast field, see *Letter to Nicholas Zapple*, FCC 70-598 (1970).

and afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (Section 315(a).)

27. Finally, we point out that the Commission does recognize the importance of fostering "a multitude of voices" in the discussion of public issues. Thus, it sought to promote the growth of FM radio, UHF television, and noncommercial educational broadcasting, and is seeking to promote a new technology which can make a most significant contribution in this respect—cable television. Because of the potentially great number of channels, cable opens up the possibility of common carrier channels, public access channels, etc. See Notices of Proposed Rule Making In Dockets Nos. 18397A and 18874, 23 F.C.C. 2d ——, released July 1, 1970. But the policy in the broadcast field is shaped by the inherent characteristics of that field. As we have shown, that policy is based on the right of the electorate to be informed, and is an issue-oriented "right of access," not the right of any individual to access.

28. At the risk of some repetition (see particularly pars. 24, 25), we believe it appropriate to take up the position set forth in the dissent of Commissioner Johnson.[11] We cannot accept the position of the dissent that the course we are taking conflicts with the First Amendment. As we understand it, the dissenting opinion of Commissioner Johnson urges that the operation of a broadcast station is analogous to the administration of a public facility, such as a park or a municipal bus (whether publicly or privately owned), and that once the facility is appropriately opened for the expression of views on public issues or commercial advertisements, it is a denial of First Amendment rights to reject or censor a profferred

[11] That dissent is addressed also to the Commission's decision in the *BEM* case, F.C.C. 70 ——, issued this day. Our discussion here is of course equally applicable to the *BEM* case, and we so stated in that opinion.

announcement constituting constitutionally protected speech by one willing to pay the customary rate, if there is ordinarily a charge. While we need not disagree with the premise that the Commission's regulation of broadcast stations under the Communications Act must meet First Amendment standards, we think that the dissent—because it ignores established First Amendment policy in this area—posits a non-existent individual right of access to broadcast facilities.

29. First of all, to the extent that the dissenting opinion urges a near-absolute right of any person who has the money to buy time, it would create a common carrier situation which Congress after due deliberation specifically rejected in Section 3(h) of the Communications Act, 47 U.S.C. § 153(h). Apparently recognizing this collision with the statute, the dissent states (page 25) that Congress and the Commission have permitted a form of private censorship which is inconsistent with the First Amendment. We must note in this connection that it is beyond the power of an administrative agency to declare its governing statute to be unconstitutional. *Central Nebraska Pub. P. & I. Dist.* v. *Federal Power Commission*, 160 F. 2d 782, 783 (C.A. 8, 1947). However, if that infirmity did not exist, we would have no constitutional qualms about our present decision.

30. In its assertion of the unconditional (except for suggested reasonable limitations on time, place and manner) [12] right to buy time, the dissenting opinion takes no account of the basic, constitutionally valid policy of the Communications Act that because radio is "inherently not available to all," *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226, there is a public duty adhering to the acceptance of a license to give adequate coverage to public issues which reflects opposing view-

[12] The dissent also mentions quality standards, an exception which is hardly consistent with its argument.

points, if necessary at the broadcaster's own expense. *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367. See also 47 U.S.C. § 315(a). As *Red Lion* makes clear, the licensee is a fiduciary with obligations to present views and voices which are representative of his community. It is through this basic approach that the paramount right and interest of the public to be fully informed is protected. The operator of a public park or transit system has no such obligation; if the analogy offered by the dissent were valid, a broadcaster would be free to present only one side of every public issue so long as he did not reject any one who chose to speak. There would be no obligation to present the other side, let alone the obligation imposed by *Cullman Broadcasting Co.*, 25 R.R. 895 (1963) to put on an opposing view without charge. It is clear, therefore, that the analogy to other types of facilities that carry speech to the public, or furnish a place for speech, is fatally faulty.

31. Furthermore, the dissent fails to be adequately specific in detailing the types of limitation which it would permit as inroads to the general principle of an absolute right of access. Presumably, the licensee would not have to turn over all of its time on a first come, first served basis, for this would mean that the issues discussed and the persons speaking would be governed entirely by money. But even if the dissent would permit the licensee to specify amounts of time and issues, the suggested system would appear to be unsound. First of all, the individual right upon which the whole dissent is premised would largely disappear. No person would have the right to discuss an issue of his choosing, at the time of his choosing, and for a duration of his choosing. How could the licensee validly determine that a particular speaker could effectively make his argument in 10 minutes, 5 minutes or a 30-second spot? Yet such determinations would be required. We have said that a licensee may

reasonably determine that a position on a complex issue should not be peddled like soap in a few seconds. The dissent would presumably upset that ruling—to what purpose? Beyond these questions is the more important difficulty that depriving the licensee of the discretion to choose representative spokesmen on controversial public issues [13] would lead us to a first come, first served platform dominated by financial considerations—the very result the dissent seeks to avoid and something the Supreme Court has already stated to be undesirable in *Red Lion*.

32. In short, we think the present system of regarding licensees as trustees, *McIntire* v. *William Penn Broadcasting Co.*, 151 F. 2d 597 (C.A. 3, 1945), *cert. den.* 327 U.S. 779, with a duty to present contrasting viewpoints through representative spokesmen, is constitutionally sound and of greater public benefit than the concept of an individual right of access, which as we have shown has great drawbacks in the broadcast field.

Part II. The right of political parties to purchase broadcast time to solicit funds [14]

33. In view of the positions now taken by the three major networks (the only parties whose policies were singled out by DNC were CBS and ABC), no extended discussion is called for in this Part.

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[13] There could be a case where the licensee's policy in this area would be arbitrary (e.g., where he covers the issue, and in announcements of a few seconds duration, and then refuses to let others discuss the issue on this basis). No such case is or has been before us. We have ruled on the assertions of DNC and BEM of general entitlement to time to discuss public issues. Our holding is in that context.

[14] While the DNC petition is couched in terms of selling time to "responsible entities" to solicit funds, the petition before us is that of a political party and our discussion here is confined to purchase of time by such parties for solicitation of funds.

34. NBC has stated that it has no policy against the sale of time to a major national political party, to be used for the solicitation of funds for the party, including during non-campaign periods. CBS initially rejected the DNC request since it occurred outside an election campaign, but has now revised its policy to permit the purchase during any period by a political party of spot announcements (not to exceed one minute in length) designed to solicit funds for the party. ABC set forth its policy that "absent special public interest considerations, ABC will not sell time for comment on controversial issues or for solicitation of funds" (p. 3, ABC of June 10, 1970, to William B. Ray), but then stated:

> The continued strength and viability of our two party system are of vital importance. ABC has emphasized in recent Congressional hearings the importance of a wider base for political contributions—small sums from millions of Americans rather than large contributions from a few.
>
> * * * *
>
> Because the strength and viability of the major political parties are vitally important, ABC would be prepared, consistent with its other obligations, to accept such orders for time from major political parties as can be accommodated on a reasonable basis. At the same time, we proposed to continue our general policy against the sale of time for controversial issue programs and announcements and solicitations for funds, absent special public interest considerations.

ABC then invited the Commission to address itself to its proposed treatment of the case.

35. We concur in that treatment. We note that Congress has singled out the presentation of the political broadcast as a particularly important aspect of the licensee's public interest obligation. See Section 315(a), *Farmer's Union* v. *WDAY*, 360 U.S. 525 (1958) (citing

F.C.C. cases); F.C.C. Memorandum on Second Sentence of Section 315(a), Hearing before Subcommittee of Interstate and Foreign Commerce Committee, 88th Cong., 1st Sess., on H.J. Res. 247, pp. 84-90. It also requires no discussion to establish that political parties are an integral part of our democratic process and that it serves the public interest to promote the widest possible support by citizens of the party of their choice. See *Voters Time Rept.*, The Twentieth Century Fund (1969), pp. 45-57.

36. In a 1963 ruling, *Letter to Lawrence M. C. Smith*, 40 F.C.C. 549, we sought to encourage the presentation of free broadcast time for this purpose stating:

> First, we recognize that the announcements described by you constitute an effort to achieve the worthwhile and commendable goal of broadening the base of political contributions. The importance of this effort was recently emphasized when, on May 29, 1962, President Kennedy transmitted to the President of the Senate and the Speaker of the House of Representatives legislation designed to carry out five of the important recommendations contained in the "Report on the President's Commission on Campaign Costs." In his letter of transmittal, the President stated, among other things:
>
> "In these days when the public interest demands basic decision so essential to our security and survival, public policy should enable presidential candidates to free themselves of dependence on large contributions of those with special interest. Accordingly, it is essential to broaden the base of financial support for candidates and parties. To accomplish this, improvement of public understanding of campaign finance, coupled with a system of incentives for solicitation and giving, is necessary."
>
> Furthermore, your proposal has an objective, in common with the broad policy underlying the "fairness doctrine"—the right of the public in a free so-

ciety to be fully informed as to controversial issues of public importance, including those involving political parties and candidates. See paragraph 6 of enclosed *Editorializing Report.*

Second, the question whether to present such announcements is one for the licensee, who is faced with many competing requests to allocate time for public service announcements. The Commission of course expresses no opinion as to how that time should be allocated. But the announcements in question should not be rejected upon the sole ground that the licensee would have to be fair in their presentation. *Lawrence M. C. Smith*, 25 Pike and Fischer Radio Reg. 291, at 293 (1963).

37. Whether such time is afforded on a free basis is a matter for the judgment of the licensee. The issue here is whether the licensee may adopt or follow arbitrary policies with respect to the sale of broadcast time to significant political parties for the solicitation of funds. Thus, the prior CBS policy of confining such sales of time to election periods would appear arbitrary, since the need for the widest possible financial support for political parties is not confined to such periods; and indeed we note that CBS offered no reason for such a distinction.

38. In this connection, we note that affording time for such solicitation does not raise any offsetting considerations, because of the combined force of a number of factors:

(i) This area can be appropriately singled out, since Congress has singled it out for special attention by broadcast licensees;

(ii) This would appear particularly to be an area where the relatively short announcement, limited very

largely to fund solicitations, is both effective and appropriate.[15]

(iii) There is no problem under *Cullman*. For, in this regard the principles set forth in *Letter to Nicholas Zapple*, FCC 70-598 (1970), would govern.

CONCLUSION

39. In view of the foregoing, the request of the DNC and ABC for a declaratory ruling IS GRANTED to the extent reflected in Part II and in all other respects, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER KENNETH A. COX

I concur. The essence of the holding as to sale of time for the discussion of controversial issues—as of the *Red Lion* and *Cullman* cases—is that a broadcaster *must* devote substantial time to the presentation of news and public affairs programming dealing with the principal issues of this area. He can sell time for this purpose—subject to *Cullman*—but we will not require him to do so against his wishes. Or he can—and this is generally to be preferred—give time for both sides. I *assume* here that the networks have given, or will give, adequate time for discussion of the key partisan political issues of our time. If not, then we must hold them to that obligation.

I therefore concur generally in this action, except for the matter contained in Paragraph 27.

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[15] Of course, the licensee may exercise judgment as to how to present these solicitations for funds, and can afford more extensive programming time, if he so chooses. Indeed, we stress again the considerable discretion of the licensee, consistent with the obligation of the fairness doctrine, as to the various facets such as number, placement, length, etc. *Cf. Lawrence M. C. Smith*, 40 FCC 549.

Dissenting Opinion of Commissioner Nicholas Johnson

[An Opening Parable]

[Once upon a time there was a nation as great in ideals as industrialization. It had business everywhere—and unsurpassed military might to protect it. And yet its greatest strength was its foundation. For this nation professed to be governed by the consent of its citizens. To insure the successful functioning of its unusual government, free education, libraries, and full information were provided in order that its 200 million governors, through wide-open debate, might govern wisely. As the years slipped by the people spent more and more time in their air conditioned homes watching television, and less and less time listening to speakers in the public parks and reading handbills on the streets. And yet the great issues, and the need for informed governors, continued. And thus it was that the great debate about the great debate began.

[Everyone had his own theory how to get the democratic dialogue back to the people (who were all home watching their television sets). Some advocated letters, petitions, press conferences, and picketing, but they didn't seem to be successful. Attention shifted to those who advocated bombing, burning, shooting and looting, because before and after the showing of such activities it was usually possible to present a short message on television (however distorted) about the merits of the issue at hand. Then a third group came along. It said, "Let us simply go to the broadcasters peacefully, and ask them for the time to present our concerns—and even pay them." They were jeered by the crowd, but not deterred. The broadcasters politely explained that there was no longer any room at their inn for the discussion of public issues—like war, and life, and politics—because the time all had to be

used for programs and announcements necessary to the very difficult but essential task of manipulating consumers to buy useless and harmful products. And yet these patient and patriotic students, businessmen, and Senators still did not give up. They continued to preach the doctrine of "working within the system." "The government," they said, "will treat us fairly. There is reason and justice in our land. Surely a democratic people need not be violent to be heard." And so it was that they came to the FCC. . . .]

The Democratic National Committee (DNC) has asked the Commission for a declaratory ruling requiring broadcasters to supply two types of "access" to their radio and television facilities: first, the right to purchase, at current commercial rates, short "spot announcements" to solicit funds for political purposes; second, the right to purchase longer segments of airtime for presentation of political programming on important national issues. The majority, so far as I can determine, has equivocated on the first request, and denied the second. I dissent.

I

We should start with a few fundamentals. The great concept of our Constitution, embodied in the First Amendment, was that our democratic government would endure only so long as its citizens and their elected representatives had the leisure to think, the right to speak, and the freedom to criticize their government. As Supreme Court Justices Holmes and Brandeis understood, "the best test of truth is the power of the thought to get itself accepted in the competition of the market," and that in a government of free men, "the deliberative forces should prevail over the arbitrary." See *Abrams* v. *United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting); *Whitney* v. *California*, 274 U.S. 357 (1927) (Brandeis, J., concurring).

The issues we grapple with today, therefore, pose a crucial question. How can we create a free and open "marketplace of ideas" over the radio and television medium in which citizens, and their elected representatives, can discuss the great issues that weigh upon our nation?

The second fundamental is equally important. For speech to be free, there must be both a *forum* for communication—whether it be a public park, school, town hall meeting, soap box, leaflet, newspaper, magazine, or radio or television frequency—as well as *procedural rules* to keep order, to make it possible for all (or most) to speak in turn, and be heard, in that forum. Perhaps the greatest legal distinction to be drawn in political and free speech theory is that between restrictions on the *content* of speech (which the First Amendment flatly prohibits), and regulations for the manner of speech (which the First Amendment not only permits but requires). As this nation's concept of speech derives principally from the model of the town meeting, I quote Professor Alexander Meiklejohn, one of the greatest champions of First Amendment freedoms, as he describes the town meeting:

> In the town meeting the people of a community assemble to discuss and to act upon matters of public interest—roads, schools, poor houses, health, external defense, and the like . . . . The basic principle is that the freedom of speech shall be unabridged. And yet the meeting cannot even be opened unless, by common consent, speech is abridged. A chairman or moderator is, or has been, chosen. He "calls the meeting to order." And the hush which follows that call is a clear indication that restrictions upon speech have been set up. . . . [N]o one shall speak unless "recognized by the chair." Also, debators must confine their remarks to "the question before the house." . . . The town meeting, as it seeks for freedom of public discussion, would be wholly ineffectual unless speech were thus abridged. . . .

Meiklejohn, *The First Amendment Is An Absolute*, 1961 Supreme Court Review 245.

Although the First Amendment would clearly ban governmental censorship of speech content, government must be concerned about the procedural rules that control the public forums for discussion. If someone—a moderator, or radio-television licensee—applies rules that give one speaker, or viewpoint, less time (or none at all) to present a position, then a censorship exists as invidious as outright thought control. There is little doubt in my mind that for any given forum of speech the First Amendment *demands* rules permitting as many to speak and be heard as possible. And if this Commission does not enact them, then the courts must require them.

The anology to broadcasting should be clear. Yet, we have permitted a system of broadcasting to develop in this country in which private licensees serve, not only as "moderators" for the electronic forums of communication, but as all the "speakers" as well. As the majority states, our limited frequencies require someone to serve as "public trustees." No one would deny this need for a "trustee" system. But that is not the issue. The issue is whether that "trustee" must control *all* the available time, or whether policy and the First Amendment require him, in a manner consistent with his other duties, to turn over reasonable portions of that time directly to the people.

In many ways, broadcasters have resolved this issue themselves. For *they* have created a system in which immediate access is granted to one, privileged class of applicants: the commercial peddler of goods and services. As the system now operates, any person wishing to sell products—toothpaste or "feminine deodorant spray," for example—has direct, personal and instant access to television. He can present his message, in the form he wishes —not in terms of "issues" (the general benefits of toothpaste or deodorant), but in terms of individual products.

He is not forced to rely upon a "trustee" to argue the cause of his product for him under some principle of the fairness doctrine—an occasional mention on the evening news, or a Sunday afternoon talk show. He does it personally and directly.

No, our Rules of Order for radio and television are fantastically skewed. We have an individual right of access, all right, but only for hucksters of industrial garbage. Anyone wishing to discuss war, peace, mental health, or the suffering of the poor, must seek out a corporate "trustee," appointed by the government, to speak for him. But the corporations that have largely contributed to these social ills can defend their wares directly. With the help of Congress and the FCC, the broadcasting industry in this country has built perhaps the most beautiful, efficient, and effective "marketplace of ideas" ever conceived and executed. The industry finds it most profitable, however, to use that marketplace only for the sale of products—not the robust, wide open debate of a free society. And the FCC finds this in "the public interest"!

II

The majority has addressed the first issue—the right to solicit funds via short announcements—in ambiguous fashion. Stating that the three networks have grudgingly announced their willingness to accept such announcements, the majority responds: "We concur in that treatment." (Par. 30.) But how does this "concurrence" rule on the request before us—namely, that broadcasters be *required* to adopt such policies? The majority hints that a denial of such time to political parties outside normal election periods would appear "arbitrary," but does not explain why, nor detail the consequences of such arbitrariness. Because, however, the majority states that solicitation announcements are "appropriate" in this area, I conclude that they make the networks' recently adopted policies binding on them.

In a companion case to this decision, *Business Executives Move for Vietnam Peace (BEM)*, FCC 70-860, Aug. 6, 1970, I have stated in detail my position that a broadcaster cannot accept commercial advertisements, yet reject advertisements which are political in nature. I believe the principles there stated are directly applicable to advertisements soliciting funds for political parties. I will not repeat them here, but merely incorporate them by reference. For reasons detailed in that opinion, I concur in the majority's decision to require licensees to accept advertisements by political parties soliciting funds.

I dissent, however, to the majority's position that broadcasters should not be required to offer time for short announcements to *all* persons for *any* purpose. As I have argued in my *Business Executives* opinion, once a licensee opens his forum to the presentation of commercial views, he cannot then close it in a discriminatory fashion—accepting some commercial views and political solicitations, but rejecting all others. I point out only that the Commission's partial waiver for the DNC to permit it to purchase fund-raising spot announcements only increases the arbitrariness and discrimination involved in denials of access to political parties for short announcements on current issues, or announcements by groups or individuals either soliciting funds or stating positions on national problems.

In *Wirta* v. *Alameda-Contra Costa Transit District*, 434 P. 2d 982 (Cal. 1967), for example, a public transit company sold advertising space in its buses for commercial products, but refused to accept an advertisement by Women for Peace, which simply stated:

> "Mankind must put an end to war, or War will put an end to mankind."—President John F. Kennedy . . .

Stating that the political "advertisement" was clearly protected by the First Amendment, the court flatly or-

dered the company to accept the advertisements for display.

> [A]dvertising is an acceptable and effective means of communication. A regulation which permits those who offer goods and services for sale . . . access to such forum, while denying it to those who desire to express other ideas and beliefs, protected by the First Amendment, cannot be upheld.

Wirta, supra, at 990. The "vice" of censorship lay in "choosing between classes of ideas," accepting commercial ones and banning all others. Every other court faced with the same issue has followed this position. See, *e.g., Hillside Community Church, Inc.* v. *City of Tacoma,* 455 P. 2d 350 (Wash. 1969); *Zucker* v. *Panitz,* 299 F. Supp., 102 (S.D.N.Y. 1969); *Kissinger* v. *New York City Transit Authority,* 274 F. Supp. 328 (S.D.N.Y. 1967). The application of this arm of the law to broadcasting is relatively new and as yet undeveloped and unapplied. But see *United Broadcasting Co.* (WHKC), 10 F.C.C. 515 (1945). I have attempted to show that these cases clearly apply to broadcasting in my *Business Executives* opinion.

The lesson of these cases is clear. The Government could not, for example, allow persons selling products to speak freely in public parks, but bar those opposing the war or require them to "speak" through an interpreter or "trustee" appointed by the Government. No court in the land would tolerate such blatant discrimination. Yet the majority permits this sort of discrimination to occur every day in our nation's electronic "public parks." Although we do not have the question before us, a broadcaster might not have to open his forum to advertising at all. But once he does, he must open it in an even-handed manner—absent some compelling showing of detriment or disruption to his normal programming services. No such evidence on this issue has been supplied to us.

I believe this Commission (perhaps for a two-year trial period) should require broadcasters to accept, up to recognized limits on numbers of commercials, *all* advertisements, whether commercial or political, from *any* person, for broadcast at rates determined by the licensee, on a first-come, first-served basis. If ghetto residents of our major cities wish to purchase announcements decrying the rat-infested, disease-ridden slums in which they are forced to live, they must be given their say. If the Daughters of the American Revolution wish to announce their support for the Vietnam War, they must be given their say. In short, I would open the broadcast spectrum to short announcements from all comers on a first-come, first-served basis. There will be time later to assess and evaluate—to consider, for example, whether the views of the rich predominate—at least, to a greater extent than they now predominate in mass media advertising. I would not expect any fairness doctrine problems. Few licensees would argue that they were unwilling to accept an advertisement because it might force them to present all views on an issue of controversy and public importance. This obligation is already incumbent upon them. And should the fairness doctrine prove unworkable in this field, it could be suspended for this type of programming.

III

The Commission also denies the DNC the right to purchase, at the going rates, half-hour or full-hour programming to discuss issues of national concern. I disagree. If broadcasters are to permit a General Motors or a Ford Motor Company, in effect, to purchase a full hour of "I Love Lucy" as a vehicle upon which to display their commercials, then I do not see how, consistent with the principles enunciated in *Wirta* and other cases, the broadcasters can refuse to permit the leading representatives of our legislative branch of government to purchase the equivalent hour to display their ideologies and concerns.

I would require licensees to accept programming of a political nature, if offered, in an amount up to 5% of their prime time evening schedule on a first-come, first-served basis. Assuming four hours of prime time every evening (from 7:00 p.m. to 11:00 p.m.), and calculating 30 days per month, that would release six hours per month to "pure access" by politicians and citizens groups alike. The individual licensee would, of course, still retain the right to reject programming for inadequate technical and production quality, or violation of federal law (lotteries, obscenity, etc.). But I would assume that programming purchased by the national political parties would, almost per se, meet any pre-established quality standards. Licensee profits would remain at their present high level. And there will be time later to assess this scheme and determine the extent to which fairness doctrine obligations apply. The fairness doctrine could be suspended in this limited area, on the assumption that persons wishing to respond could purchase the necessary reply time. Obviously this 5% figure is only an initial, approximate determination, and obviously any other reasonable percentage determined by the licensee would also be approximate. But the point is that licensees could not reject *all* programming.

The majority essentially raises several objections to such a procedure. First, they argue that this would permit those with "strong financial resources" to pre-empt time and distort the presentation of issues. And they maintain that the views of the wealthy would dictate the agenda of national debate. I disagree. The short answer is that the wealthy already set the agenda for national debate, and a partial "access-for-purchase" procedure would only open a closed system to partial dissent. A longer answer, however, is simply that I have more faith in the theoretical "marketplace of ideas" than does the majority. I am not aware that opening the pages of newspapers or magazines, or the wall space of buses, train stations or subway platforms, have resulted in a

preponderance of "wealthy" views. And I do know that the "Political advertising" that appears in daily newspapers—urging, for example, citizens to write the President in support or opposition of the Vietnam war—is more stimulating and thought-provoking than those of department stores and food chains. All in all, I do not see any imbalance in that system of "print" access. Why should we expect it in radio and television?

But more importantly the dissemination even of "false" or one-sided political ideas often serves a socially useful purpose. False commercial ideas (such as the notion that modern cars are "safe," or do not pollute the air) are unlikely to generate opposing claims; at best, they merely goad competing manufacturers into more and more extravagant claims. On the other hand, expressions of political opinion in this country usually lead to argument and debate, not silent acquiescence; to vigorus opposition, not passive acceptance. And debate and dissent is always healthy. John Stuart Mill saw this over 100 years ago, and I do not believe the passing century has proven him wrong:

> The peculiar evil of silencing the expression of opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

J. S. Mill, *On Liberty*, quoted in *Buckley* v. *Meng*, 230 N.Y.S. 2d 924, 932 (Sup. Ct. 1962). Given a system in which the small citizen and the man of moderate means are totally cut out from a system of communication, therefore, I believe a partial access system might move a small way toward righting the present imbalance.

The majority's second justification for its position is that we have a limited number of frequencies, and that some "trustee" must necessarily exercise control over broadcasting time. Any other system would result in chaos. Again, this begs the question. Merely because a "trustee" or "gatekeeper" must control some of the time, I see no compelling reason why he must control *all* of it. Broadcasters have essentially abdicated this "trustee" authority to commercial advertisers, gobbling up sponsors as rapidly as they approach, and limiting themselves only by the commercial maximums suggested for radio and television. They have also, on occasion, sold entire hours to sponsors such as Xerox or National Geographic to present their own programming. The question before us, therefore, is whether the present system of broadcasting could function with a *partial* system of access, leaving the vast bulk of programming still under the control of the networks and individual licensees. Nothing the majority has said convinces me that this is impossible.

The third reason given by the majority is that Section 3(h) of the 1934 Communications Act prevents licensees from being treated as a "common carrier." There are many defects in this position, some of which I have dealt with in my dissenting opinion in *Business Executives*, FCC 70-860, Aug. 6, 1970. Some are as follows.

First, the legislative history of this provision suggests that the drafters of the 1934 Act were concerned only that Title II of the Act, "Common Carriers," and its rather complicated system of regulation, not be imposed on radio. No one would argue that a partial access system would have this result.

Second, Congress wrote into the 1934 Act the concept that broadcast licensees must serve the "public interest, convenience, and necessity." And it goes without saying that the basic principles of the First Amendment are also incorporated implicitly into the Act. We do not have to declare unconstitutional Section 3(h) of the Act to say

that broadcasters must treat persons wishing to do business with it equally. We have ruled in our *Letter to Nicholas Zapple*, FCC 70-598 (1970), for example, that even apart from Section 315(a) considerations, there may be only one appropriate person or spokesman that can satisfy the fairness doctrine obligation imposed upon broadcasters in certain situations. Does this violate Section 3(h) of the Act, by taking from the licensee choice over the person that uses his facilities? Of course not. A limited system of access for purchase is perfectly consistent with Section 3(h) of the Act, the "public interest," and the First Amendment. Indeed, the First Amendment may require such a system or some reasonable facsimile.

Third, a reasonable system of access does not make broadcasters into common carriers. A doctrine preventing broadcasters from rejecting all persons wishing to submit political advertising or other programming does not force licensees to accept everyone. Obviously broadcasters can establish reasonable limitations on the amount of time he will offer other persons. See *United Broadcasting Co.* (WHKC), 10 F.C.C. 515 (1945). The First Amendment does not establish any particular proportion on percentage figure; it does require, however, that broadcasters devote *some* "reasonable" portion of their time to "access" programming.

IV

The matters before us go far beyond freedom of speech. For in the last analysis, we are confronted with one of the most serious challenges to the system of "checks and balances," the separation of the legislative and executive powers of government, that our country has ever faced. If, for example, through some bizarre turn of events the President, but not the Congress, was granted access to the computer, the telephone, the telegraph, the typewriter, the printing press, and the Xerox machine, we

would also see a constitutional quandry of the proportions that face us now. The President has immediate, direct and vivid access to all the minds of the prime-time television viewers in America. Can our tri-partite scheme of government survive if the Congress receives substantially less?

Unlike the fairness doctrine, which often imposes a burden on broadcasters due to the importance of the *issue* to the public, principles of pure "access" pay their own way. The broadcasting industry is out-of-pocket nothing. The great mass of news, documentary and entertainment programming will be unaffected. And the forums of the air will be opened to the breeze of dissent, controversy, and thought.

Unlike the fairness doctrine, an "access" system is self-enforcing. No governmental agency is called upon to decide which issues are controversial and of public importance. Issues reach the public immediately, without the years of delay required to push a fairness doctrine controversy through the Commission and the courts.

And, unlike the present system, the views that reach the people will not be dominated by the consensus committees of the corporate television establishment. There are some who fear that the agenda of debate will be set by the rich. But who, after all, sets that agenda now? The great mass of television programming consists of format entertainment series, carefully designed as supportive and palatable packaging for the commercial content supplied by the merchandisers of our land. To the extent a network seeks to provide programming which is "offensive" to some corporate interest, then pressures for censorship are brought to bear—as Coca Cola is alleged to have pressured NBC over its recent documentary on migrant workers. All we can hope for is a system of access in which at least a small percentage of the time and views will originate directly from the people—of

all views, persuasions, and walks of life. That even that modest participation is anathema to the broadcasters is testimony to their dangerous arrogance and unrestrained power. Accordingly, I dissent to today's Commission action.

APPENDIX E

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 3(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 153(h), provides:

> "'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

Section 315 of the Communications Act of 1934, as amended, 47 U.S.C. § 315, provides:

> "(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section."

Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. § 326, provides:

"Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-863

COLUMBIA BROADCASTING SYSTEM, INC., *Petitioner,*

v.

DEMOCRATIC NATIONAL COMMITTEE, *Respondent.*

No. 71-864

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Petitioners,*

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE and DEMOCRATIC NATIONAL COMMITTEE, *Respondents.*

No. 71-866

AMERICAN BROADCASTING COMPANIES, INC., *Petitioner,*

v.

DEMOCRATIC NATIONAL COMMITTEE, *Respondent.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT DEMOCRATIC NATIONAL COMMITTEE IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been officially reported. It is reproduced in Appendix A to the petition filed by the Federal Communications Com-

mission in No. 71-864.[1] The decision of the Federal Communications Commission is reported at 25 F.C.C. 2d 216 (1970) and is reproduced in Appendix B to the petition filed by the Commission in No. 71-864.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petitions filed in these cases.

QUESTION PRESENTED

Whether the court below erred in ruling that an absolute ban on all paid announcements to discuss public issues imposed by broadcast licensees and endorsed by the Federal Communications Commission is inconsistent with the First Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional provisions and some of the pertinent provisions of the Communications Act of 1934 are set forth in the petitions filed in these cases. The following provisions of the Communications Act also bear upon the issues in these cases:

Section 307(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 307(a), provides:

> "The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any

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[1] Appendix citations in this brief will be to the appendices attached to the petition filed by the government, which will be referred to as "FCC Pet."

applicant therefor a station license provided for by this chapter."

Section 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(a), provides:

> "Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

STATEMENT

The Democratic National Committee (DNC), a respondent in these cases, is the governing body of the National Democratic Party between conventions. On May 19, 1970, DNC filed with the Federal Communications Commission (Commission) a request for a declaratory ruling that broadcast licensees "may not, as a general policy, refuse to sell time to responsible entities, such as the DNC, for the solicitation of funds and for comment on public issues." FCC Pet., App. B, p. 48a. The Commission is authorized to issue such rulings pursuant to section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e), and section 1.2 of its own regulations, 47 C.F.R. § 1.2.

At the time the request was filed, DNC was planning an extensive campaign on television and radio to raise money for the Democratic Party. The Party had in-

curred substantial debts during the 1968 presidential campaign, and funds were desperately needed to meet the demands of creditors. In addition, the 1970 off-year elections were on the political horizon, and money was needed to support the campaigns of Democratic candidates for national office. DNC realized from the outset that any effective campaign to solicit funds would have to be accompanied by statements of the Democratic Party's position on controversial issues of public importance and the Party's alternatives to the policies of the incumbent Republican Administration.

DNC selected the broadcast media for its planned campaign for two reasons. First, that forum—and particularly television—is the most powerful and most effective medium of communication ever devised by man. Second, access to the broadcast media would permit DNC to reach the greatest potential number of small contributors and thus reverse the disturbing tendency of political parties to rely on large contributions. DNC's initial inquiries, however, had indicated that the broadcast networks and individual licensees had widely varying policies concerning the sale of time for the purposes intended by DNC. For example, some broadcasters flatly refused to sell time for such purposes; others limited the sale of time for such purposes to election campaign periods. DNC sought the declaratory ruling before expending the thousands of dollars necessary to develop its media campaign.

With Commissioner Johnson dissenting, the Commission rejected the declaratory ruling sought by DNC. The Commission ruled, in effect, that broadcasters could, consistent with their obligations under the "public interest" standards of the Communications Act and

the First Amendment, refuse to sell any time to DNC or other responsible entities to discuss controversial issues of public importance.[2]

The Commission's endorsement of the broadcasters' flat ban on paid editorial advertisements [3] was grounded in what the court of appeals aptly described as "spectres of chaos, grossly unbalanced programming and financial disaster." FCC Pet., App. A, p. 42a. The Commission, for example, said that the rule sought by DNC would result in "a return to the chaotic situation of radio's early days," that "the public's agenda for discussion of public issues would . . . be set substantively and increasingly by the affluent," and that broadcasters would no longer be able to exercise their editorial judgment and journalistic control over "the manner in which the public is to be informed." FCC Pet., App. B, pp. 65a-66a. The Commission's opinion, however, is devoid of any attempt by the Commission to apply its administrative expertise to reconcile the conflicting interests it perceived.

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[2] The Commission did rule that it would be arbitrary for broadcasters to refuse to carry paid fund-raising solicitations by the major political parties or limit such solicitations to election periods. FCC Pet., App. B, pp. 72a-75a. However, the Commission's endorsement of the flat ban on editorial advertisements renders its ruling on fund-raising solicitations meaningless. To be effective, any fund-raising solicitation sponsored by DNC on the broadcast media would necessarily have to be accompanied by an expression of the Democratic Party's positions on controversial public issues. The Commission's approval of the flat ban on editorial advertisements presumably would permit a broadcaster to reject a fund-raising solicitation that also contained comment on public issues.

[3] The term "editorial advertisements" is used throughout this brief to describe paid announcements by responsible entities seeking to express their views on public issues.

The net result of the Commission's ruling is to permit the hawkers of detergents, mouth washes, beer, dog food and brassieres to maintain their present monopoly over that portion of the broadcast day that is reserved for paid announcements.

On the same day that the Commission denied DNC's request for a declaratory ruling, it also denied a complaint against a Washington, D.C., radio station filed by the Business Executives' Move for Vietnam Peace (BEM), an organization opposed to this country's Indochina policies. BEM's request to purchase time to present spot announcements expressing its opposition to the war in Indochina was rejected by the station and, relying essentially on its reasoning in its DNC ruling, the Commission sustained the station's action. FCC Pet., App. C. Both DNC and BEM sought review in the court of appeals.

The court of appeals, with one judge dissenting, reversed the Commission's endorsement of the flat ban on editorial advertisements. "We hold specifically that a flat ban on paid political announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted." FCC Pet., App. A, p. 3a. The court was careful, however, to limit its ruling to the very narrow question it was deciding:

> "The actual issue before us is relatively narrow and we decide it narrowly. . . . [W]e leave undisturbed the licensee's basic right to exercise judgment and control in public issue programming and the sale of advertising time. All we do is forbid an extreme form of control which totally excludes controversial public debate from broadcast advertising time. . . . We do not hold, however, that the planned announcements of the petitioners—or, for that matter, of any other particular applicant

> for air time—must necessarily be accepted by broadcast licensees. . . . [W]e confine ourselves to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many 'editorial advertisements' will be put on the air." *Id.*

The court of appeals' decision was firmly grounded in this Court's seminal ruling in *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367 (1969), which recognized the predominant First Amendment interest of the viewing and listening public in being fully informed by the broadcast media of conflicting viewpoints on controversial issues of public importance. The court below ruled that the rights defined by *Red Lion* necessarily included an interest in the mode and manner in which those viewpoints were presented. "It is too late to argue that the First Amendment protects ideas but not an individual's interest in expressing them and doing so in his own way." FCC Pet., App. A, p. 22a.

The court found that editorial advertisements had a unique potential for furthering those First Amendment values. Unlike normal programming over which broadcasters exercise total control of format and content, editorial advertisements give to those who wish to speak on public issues an opportunity to exercise such control. For that reason, the court described editorial advertisements as "a special and separate mode of expression, not simply a duplication of other expression on the same medium." FCC Pet., App. A, p. 23a. In addition, the court noted that, "[i]n the First Amendment area, our best guarantee has always been a 'free market' in which partisans who feel strongly on partic-

ular issues may decide on their own to speak out and to speak out in their own way." FCC Pet., App. A, p. 24a.

The court responded to broadcaster objections that any requirement they accept editorial advertisements would deprive them of their traditional journalistic control over the presentation of public issues. The court noted that it was dealing only with that portion of the broadcast day—the portion reserved for paid announcements—"in which *editorial* control over content has never been of major importance." The court also stressed that "broadcasters would retain full latitude to control the content of their programming." FCC Pet., App. A, p. 38a.

The broadcasters and the Commission raised a variety of other objections to any scheme for editorial advertisements—objections that the court characterized as suggestions of an "administrative apocalypse"[4] and "spectres of chaos, grossly unbalanced programming and financial disaster."[5] The court discussed each of those objections, ruling that some did not override the First Amendment interests at stake and that others could be resolved by an exercise of the Commission's administrative expertise. The court noted that it was recognizing only an "abridgeable" right of access to the broadcast media for the presentation of editorial advertisements. FCC Pet., App. A, p. 22a. "It is well established in First Amendment law governing access to forums that 'reasonable regulations' may be promulgated and enforced to limit the exercise of free speech." FCC Pet., App. A, p. 39a. The regulations

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[4] FCC Pet., App. A, p. 40a.

[5] FCC Pet., App. A, p. 42a.

referred to by the court commonly govern the time, place and manner of such speech. By opposing such a limited and abridgeable right, the court viewed the Commission and broadcasters as proposing an extreme form of censorship by which "public issue advertising may be aired 'at no time, in no place, and in no manner' over the broadcast media." FCC Pet., App. A, p. 39a.

The court remanded the case to the Commission to "develop reasonable regulatory guidelines to deal with editorial advertisements" and to determine whether, in light of the regulatory guidelines developed, DNC would be entitled to purchase time to present the public issue announcements it was planning. FCC Pet., App. A, p. 44a.

ARGUMENT

In their efforts to persuade this Court to grant plenary review of the decision below, petitioners have shrouded the issues in this case in a fog of hyperbole and shrill rhetoric that obscures the limited and narrow impact of the court of appeals' ruling. Petitioners convey the impression that the court below has unjustifiably demolished the congressionally mandated scheme for regulating broadcasting and has undermined the entire foundation of public issue broadcasting in this country. It takes only a cursory reading of the decision below to lift that fog of hyperbole and shrill rhetoric and to realize that the extremely narrow ruling by the court of appeals does not warrant plenary review by this Court at this time.

The court below took special pains to emphasize the narrowness of its ruling because the same visions of Armageddon that characterize the petitions in this Court permeated the arguments made by the Commis-

sion and the broadcast networks in the court of appeals. Confronted by those forebodings of doom for the broadcast industry and predictions of an "administrative apocalypse"[6] for the Commission, the court below stressed:

> "The actual issue before us is relatively narrow and we decide it narrowly. We do not have to cut the 'heart' of our system of broadcasting; we leave undisturbed the licensee's basic right to exercise judgment and control in public issue programming and the sale of advertising time. All we do is forbid an *extreme* form of control which totally excludes controversial public debate from broadcast advertising time." FCC Pet., App. A, p. 3a. (Emphasis in original.)
>
> * * *
>
> "The arguments of the Commission and intervenors fall well short of the mark. The reason is that they have apparently misunderstood the narrowness of the issue here. All that we are considering is the permissibility of a total, flat ban on editorial advertising. All petitioners ask is that broadcasters be required to accept *some* editorial advertising. They do not advocate an absolute right to air their advertisements." FCC Pet., App. A, p. 37a. (Emphasis in original.)

Consistent with those admonitions, the court below stated its narrow holding concisely and precisely: "We hold specifically that a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted." FCC Pet., App. A, p. 3a.

The relief granted by the court below was equally narrow. That court simply remanded the proceeding

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[6] FCC Pet., App. A, p. 40a.

to require the Commission to apply its administrative expertise and to "develop reasonable regulatory guidelines to deal with editorial advertisements"[7]—an exercise that the Commission studiously avoided in considering DNC's request for a declaratory ruling. The court even stopped short of deciding whether DNC was entitled to purchase broadcast time to present the public issue announcements it had planned. The court left that determination to be made by the Commission in light of the regulatory guidelines it developed. FCC Pet., App. A, p. 44a.

The sweeping attack now launched on that narrow ruling is based on nothing more than petitioners' speculative ruminations about the possible consequences of that ruling and their belief that workable regulatory guidelines will be impossible to devise. Petitioners' fears of hypothetical harm are an insufficient basis for plenary review by this Court at this time. This Court confronted similar arguments in the *Red Lion* case and responded: "[W]e will not now pass upon the constitutionality of [the challenged] regulations by envisioning the most extreme applications conceivable, . . . but will deal with those problems if and when they arise." 395 U.S. at 396. The Commission should be given an opportunity to develop regulatory guidelines governing editorial advertisements before this Court intercedes. In fact, the Commission had embarked on just such a course even before the court below issued its decision that is now under attack.[8]

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[7] FCC Pet., App. A, p. 44a.

[8] See *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, Docket No. 19260, 30 F.C.C.2d 26 (1971) [hereinafter cited as *Fairness Doctrine Inquiry*].

Two of the petitioners, Columbia Broadcasting System (CBS) and American Broadcasting Companies (ABC), also allege a conflict in the circuits as a basis for review in this Court. DNC will show that the supposed conflict does not exist.

I. Review by This Court at This Time Would Be Premature

In passing upon the constitutionality of the Commission's personal attack and political editorializing rules in the *Red Lion* case, this Court was confronted by broadcasters' contentions that those rules would inevitably result in self-censorship and a reduction or elimination of public interest programming. The Court dismissed those cries of alarm by noting that, "if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider their constitutional implications." 395 U.S. at 393. That principle applies with even greater force in this case.

In rejecting the declaratory ruling requested by DNC, the Commission did little more than accept the predictions of dire consequences conjured up by the broadcasters. For example, the Commission agreed with the broadcasters that DNC's proposal could result in "a return to the chaotic situation of radio's early days" and in "the public's agenda for discussion of public issues . . . [being] set substantively and increasingly by the affluent." FCC Pet., App. B, p. 65a. At no time did the Commission draw upon its administrative expertise to examine whether those supposed consequences could be avoided by the devlopment of reasonable regulatory guidelines to govern editorial advertisements.

In effect, petitioners are asking this Court to grant plenary review only on the basis of their perception of the harm that might flow from the decision below before the Commission has applied its special expertise to seek to obviate that harm. In *Red Lion,* this Court declined to anticipate the possible constitutional consequences of rules already promulgated by the Commission solely on the basis of suppositions that harm might result from those rules. Here the Commission has not even undertaken to promulgate rules to accomodate the conflicting interests that have emerged from DNC's request for a declaratory ruling. In *Red Lion,* this Court made clear that it would not reach the merits of potential constitutional issues affecting broadcasting until the harm feared from Commission rules had matured into a reality through experience with those rules. It necessarily follows that review by this Court is premature when the Commission has not yet promulgated the rules that could make the broadcasters' fears even more illusory than they are at this stage of these proceedings.

The petition filed by the government in this case confirms that careful consideration by the Commission of the problems related to editorial advertisements could eliminate the hallucinatory concerns expressed by CBS and ABC in their petitions. The government notes that the Commission has undertaken a general inquiry into the fairness doctrine[9] and might well "reach a result similar to that ordered by the court of appeals." FCC Pet., p. 15. The government notes only that such a result would be reached "only after careful and thorough consideration of the evidence and opinions elicited in this inquiry," and it lists the various ramifications of

[9] *Fairness Doctrine Inquiry, supra,* note 8.

editorial advertisements that the Commission intends to explore in that inquiry. *Id.* Thus, the Commission has already set in motion the machinery for complying with the limited mandate of the court of appeals. By deferring any possible review of the questions presented by the decision below until the Commission completes its present inquiry, the Court will have the benefit of the evidence and opinions offered in that inquiry and the Commission's considered evaluation of that evidence and those opinions.

There is a certain irony in the government's decision to seek review in this Court after the Commission has initiated a rule-making proceeding to consider, *inter alia,* the very issue decided by the court below. That inquiry was begun before the court below issued its decision and at a time when the Commission's ruling on DNC's request for a declaratory ruling was the prevailing legal standard. In its Notice announcing that inquiry, the Commission referred specifically to its ruling on DNC's request but nevertheless solicited comments on "whether there is any feasible method of providing access for discussion of public issues outside the requirements of the fairness doctrine." *Fairness Doctrine Inquiry,* 30 F.C.C. 2d at 33. But, now that the court of appeals has agreed that question deserves further consideration, the Commission is seeking review of the issue of editorial advertisements in this Court and has simultaneously suspended its consideration of that question in the pending rule-making proceeding.[10]

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[10] See "Order Extending Time" in FCC Docket No. 19260 (*Fairness Doctrine Inquiry, supra,* note 8), released January 3, 1972. On the same day that the Commission released that Order, the government filed its petition with this Court seeking review of the court of appeals' decision.

At root, the court below has required the Commission to do nothing more than it had already decided to do. Yet the petitioners—and particularly CBS and ABC—foresee only disaster for broadcasting if the Commission is now permitted to pursue that course. Those cries of alarm can be explained only by petitioners' inability or refusal to comprehend the very narrow impact of the decision below.

Petitioners suggest, for example, that the court of appeals has stripped them of their journalistic supervision and control over public issue programming. See CBS Pet., p. 12; ABC Pet., p. 9. The court below, however, was careful to note that its decision had no such impact on broadcasters' normal programming responsibilities. It pointed out that it was dealing only with that portion of the broadcasting day—the portion allocated for paid advertisements—"in which *editorial* control over content has never been of major importance." FCC Pet., App. A, p. 38a. In other words, the court below dealt "only with time relinquished by broadcasters to others" and in which "broadcasters have no . . . strong First Amendment interest." *Id.* at pp. 19a-20a. Thus, even the broadest possibe reading of the decision below leaves untouched the very interest of broadcasters that petitioners suggest has been jeopardized.

Petitioners further contend that any requirement that broadcasters carry some editorial advertisements will necessarily conflict with their fairness doctrine obligations [11] and give the wealthy a more powerful voice on the broadcast media.[12] The court of appeals

[11] See ABC Pet., pp. 10-11.

[12] CBS Pet., pp. 14-15; ABC Pet., pp. 11-12.

acknowledged that such problems might arise from its invalidation of the flat ban on editorial advertisements. But it did not view the mere existence of those problems as a sufficient justification for perpetuating that ban. Rather, it viewed those problems as peculiarly susceptible to resolution through the Commission's administrative processes, and it specifically suggested that the Commission address those problems under the court's mandate. FCC Pet., App. A, pp. 40a-42a. Petitioners, however, urge the mere existence of such problems as a sufficient reason for interdicting this proceeding in this Court before the Commission has an opportunity to develop reasonable regulatory guidelines.

CBS argues that a necessary consequence of the decision below will be to fill the airwaves with paid announcements on "stale," "insignificant" and "trivial" issues. CBS Pet., p. 15. It is somewhat surprising to find such an argument made by those who preside over a medium that was described a decade ago as a "vast wasteland" [13] and that, if anything, has become more barren of substance and quality since. For example, a recent profile of the CBS executive responsible for programming decisions summarized his philosophy as a preference for "not programs that he thinks people will necessarily *like*, or *benefit* from, or be *enriched* by, but programs he thinks people will watch." [14] That

[13] That description of the desolate nature of television programming was first used by Newton Minnow, then Chairman of the Federal Communications Commission, in an address to the 39th Annual Convention of the National Association of Broadcasters in Washington, D. C., on May 9, 1961. That address is reprinted in N. Minnow, *Equal Time* 47 (1964).

[14] T. Thompson, *The Crapshoot for Half a Billion*, Life Magazine, Sept. 10, 1971, p. 47. (Emphasis in original.)

same network now suggests to this Court that editorial advertisements will somehow demean the quality of television programming, necessarily sweeping within its pejoratives the paid announcements planned by DNC —announcements designed to discuss current issues affecting the conduct of our government and to acquit the Democratic Party's responsibilities as one of the two major political parties in our democratic system.

This CBS argument betrays the real interest of the broadcasters in pursuing this proceeding in this Court. Bluntly stated, the broadcasters seek to preserve the monopoly they presently enjoy in deciding what public issues the American people should be exposed to through the electronic media. The court below has simply ruled that other groups in society should, to some degree, share that awesome responsibility with the few who are privileged to control the limited number of broadcast licenses available and the handful of corporate executives who control the three networks in this nation. It is understandable that broadcasters would find such a result disquieting. But the court below was concerned with core First Amendment values and not with broadcasters' sensibilities.

CBS and ABC also assert that the decision below is in conflict with this Court's decision in *Red Lion*. See CBS Pet., pp. 12-13; ABC Pet., pp. 8-9. That argument will not withstand analysis. The *Red Lion* decision was the constitutional touchstone for the court of appeals' decision. That court, however, did not view *Red Lion* as placing inflexible parameters on the First Amendment interests at work in broadcasting. *Red Lion* dealt only with the interplay between the First Amendment and the fairness doctrine as they relate to a broadcaster's statutorily imposed public interest obli-

gations. But the fairness doctrine does not define the totality of those public interest obligations. As the court below observed, "the fairness doctrine's goal of full and fair coverage of issues on normal programming time does not eliminate the public's interest in a further, *complementary* airing of controversial views during advertising time." FCC Pet., App. A, p. 28a. (Emphasis added.) Thus, rather than being at odds with *Red Lion,* the decision below is, if anything, an obvious and constitutional implementation of that seminal ruling in the context of editorial advertisements.

The central argument made in this Court by the government differs substantially in tone and import from the arguments made by CBS and ABC. In essence, the government argues that, by basing its decision on constitutional grounds, the court below has shifted the prime responsibility for "the making of the basic policy judgment [relating to editorial advertisements] from the Commission to the courts, and, in so doing, sets a new and significant course for broadcasting." FCC Pet., p. 10. The government thus seems to be suggesting that the court of appeals has improperly usurped a function committed solely to the Commission's unbridled discretion. That argument misses the mark.

The court below was fully aware the maintenance of a viable regulatory scheme for broadcasting required that it tread cautiously "when we are asked to reverse major substantive interpretations of the grand and open-ended statutory requirements" of the Communications Act. FCC Pet., App. A, p. 9a. Courts are traditionally reluctant to intercede in matters that require an administrative agency to exercise its special expertise. But the issues in this proceeding trans-

cended matters within the Commission's peculiar technical competence. The declaratory ruling sought by DNC drew into question the obligations imposed on broadcasters by the First Amendment. Courts—and not administrative agencies—are the appropriate arbiters of constitutional disputes.

In response to an analogous argument made in *Red Lion,* this Court admonished that "Congress need not stand idly by and permit those with [broadcast] licenses to ignore the problems that beset the people or to exclude from the airways anything but their own views of fundamental questions." 395 U.S. at 394. Similarly, the courts need not hold the Constitution in abeyance while the Commission endorses actions by broadcasters that jeopardize or deny the effective exercise of First Amendment rights.

For these several reasons, petitioners have stated no substantial reason to justify review of the decision below by this Court at this time. Rather, as DNC has shown, review by this Court at this time would be premature.

II. There Is No Conflict in the Circuits

CBS and ABC assert as an additional ground for review by this Court the claim that the decision below is in direct conflict with decisions by courts of appeals in two other circuits.[15] Those two petitioners purport to find different bases for the supposed conflict, but their arguments are equally without merit.

ABC contends that the holding by the court below that the actions by broadcasters constitute state action

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[15] The government's petition does not claim that review is necessary because of a conflict in the circuits.

and are thus subject to the restraints of the First Amendment conflicts with contrary rulings in *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950), and *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946). In both cases, the courts of appeals rejected claims of a right of access growing out of contractual commitments but framed in constitutional terms on the ground that a broadcaster's actions are private in nature and are thus unrestrained by constitutional guarantees. The court below refused to follow those decisions, observing that they reflected "a crabbed judicial view of 'state action.'" FCC Pet., App. A, p. 11a.

In its state action ruling, the court below was simply applying constitutional principles evolved in decisions by this Court—decisions that have rendered obsolete the restrictive view of state action expressed in the *Massachusetts Universalist Convention* and *McIntire* cases. Only two years after the *Massachusetts Universalist Convention* case was decided, this Court held that, when a federal agency licenses a private organization to provide services to the public and when that agency exercises continuing and pervasive supervision to assure compliance with statutory requirements, the First Amendment applies with equal force to the licensee and the agency. *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952). Subsequent decisions by this Court have abandoned the rigid and formalistic classification of behavior as "private" and "state" and have examined instead the realities of interaction between government and private groups to determine whether constitutional restrictions are applicable. See, *e.g.*, *Amalgamated Food Employees Union* v. *Logan*

Valley Plaza. Inc., 391 U.S. 308 (1968); *Evans* v. *Newton,* 382 U.S. 296 (1966); *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961). "Conduct that is formally 'private' may become so intertwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans* v. *Newton, supra,* 382 U.S. at 299.

One would have to blink at reality to conclude that broadcasting in this country is not "intertwined with governmental policies." Virtually all aspects of a broadcaster's operations are subject to the Commission's control and supervision. Indeed, the ban on editorial advertisements at issue in this case could not exist without the Commission's consent and approval. If any conflict exists on the state action question, it is between the decisions of the First and Third Circuits cited by ABC and the decisions of this Court.

CBS alleges that the conflict exists only with respect to the Third Circuit's decision in *McIntire* and only with respect to the Third Circuit's observations on the First Amendment issues implicit in the question of the right of access to the broadcast media. CBS claims that the Third Circuit's opinion constitutes "a square rejection of the First Amendment claim" of any such right of access. CBS Pet., p. 18. However, in light of the Third Circuit's state action ruling in *McIntire,* its comments on the First Amendment issue were nothing but dicta. A supposed conflict between dicta in one circuit and a holding on an issue of law in another circuit does not require resolution by this Court.

CBS contends, however, that the *McIntire* dicta was subsequently adopted and applied by the Third Circuit to a First Amendment claim of access in *Avins* v.

Rutgers, 385 F.2d 151 (3d Cir. 1967), *cert. denied,* 390 U.S. 920 (1968). The *Avins* decision dealt only with an author's claim that his article was improperly rejected for publication in a law review. But in considering only access to the print media, *Avins* neither addressed nor reached the markedly different First Amendment considerations involved in access to the broadcast media. In fact, *Avins* predates this Court's decision in *Red Lion,* which represents the first effort to sketch the contours of the First Amendment values at work in broadcasting. It is extremely doubtful that even the Third Circuit would agree that its simplistic view of the First Amendment's relevance in broadcasting, first expressed 27 years ago in *McIntire,* has survived the *Red Lion* decision. Consequently, any arguable conflict between the *McIntire-Avins* decisions and the decision below is more apparent than real. It is certainly not a conflict that requires resolution by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: February 2, 1972

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE.

IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-864, 71-863, 71-865, 71-866

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE.

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The Opinion of the court of appeals is not yet officially reported. The opinions of the Federal Communications Commission are reported at 25 F.C.C. 2d 242 and 25 F.C.C. 2d 216. These opinions are set out in their entirety in Appendices A, B, and C, respectively, to the Petition for Certiorari filed in No. 71-864.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1971 and reissued on October 29, 1971. Petitions for rehearing and rehearing *en banc* were denied by the court of appeals on October 4, 1971. Petitioner invoke this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech.

QUESTIONS PRESENTED

Whether (1) a decision of the U. S. Court of Appeals for the District of Columbia Circuit which set aside on First Amendment grounds a flat ban by broadcasters against selling *any* of their advertising time to persons wishing to speak about controversial issues of public importance and remanded to the Federal Communications Commission for further study and the formulation of reasonable guidelines is, in the total absence of evidence in the record to support any of petitioners' arguments, ripe for review by this Court and (2) whether any conflict among the Circuits exists which might warrant review by this Court.

Respondent, Business Executives' Move for Vietnam Peace, suggests that both questions should be answered in the negative and certiorari be denied.

STATEMENT

Washington, D. C. radio station WTOP holds out for sale to advertisers 18 of the 60 minutes in every hour it is on the air. Among the advertisements carried on November 13, 1970, for example, were a 75-second commercial for Bryce Mountain Land Development;[1] a 60-second advertisement for Manischevitz Wines;[2] and a 60-second commercial for Dr. Scholl's Foot Deodorant.[3] Yet, WTOP refused to sell respondent Business Executives' Move for Vietnam Peace, BEM, any time to broadcast a 60-second spot announcement presenting the views of prominent American industrial and military leaders opposing the Vietnam war:

> [I]t is the policy of [WTOP] radio and television stations not to sell spot announcement time to individuals or groups in order to set forth a point of view on any controversial subject of public importance. (Joint Appendix in the Court of Appeals at 7.)

BEM asserted before the Federal Communications Commission (hereafter "the Commission") that WTOP's flat ban on selling spot announcement time for controversial speech contravened the First Amendment. BEM made no claim with respect to the remaining 42 minutes per hour that WTOP reserves for presenting its own programming and views as it sees fit, subject only to loosely defined

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[1] Brief of Business Executives' Move for Vietnam Peace App. C at 2.

[2] *Id.*, p. 3.

[3] *Id.*, p. 8.

responsibilities to program in the "public interest",[4] "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance"[5] and other broadly phrased responsibilities.[6] BEM makes no effort to alter, abridge, amend or otherwise affect any of these programming time rights and obligations of licensees.[7] All that is before this Court then is the 18 minutes per hour which WTOP makes available for sale to advertisers to solicit in their own words and format customers for goods and services.

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[4] Communications Act of 1934, Sections 307, 309, as amended, 47 U.S.C. §§307, 309.

[5] Communications Act of 1934, Section 315(a), 48 Stat. 1088, as amended, 73 Stat. 557, 47 U.S.C. §315(a). This obligation and the body of law surrounding it is generally known as the "fairness doctrine."

[6] See Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C. 2d 650 (1971); Network Programming Inquiry, 25 Fed. Reg. 7291 (1960).

[7] BEM did assert an alternative theory before the Commission – *i.e.*, that its advertisements were entitled to be aired under the fairness doctrine. This claim was denied by the Commission. See Petition for Certiorari in No. 71-864 (hereinafter cited "Pet.") filed by the Solicitor General on behalf of the United States and the Federal Communications Commission, App. C, 91a-101a.

The Petition of the United States and the Commission (No. 71-864) seeks a writ of certiorari in both *DNC* and *BEM*. Post-Newsweek Stations, Capital Area, Inc., licensee of WTOP (hereinafter referred to as "Post" or "WTOP"), also seeks certiorari in BEM. (No. 71-865.) (Its Petition is hereinafter cited "Post Pet.") Columbia Broadcasting System, Inc. (hereinafter referred to as "CBS") (No. 71-863) and American Broadcasting Companies, Inc. (hereinafter referred to as "ABC") (No. 71-866) have each filed a Petition for Certiorari in *DNC*. (Hereinafter these Petitions are cited "CBS Pet." and "ABC Pet.",

(continued)

While BEM's complaint was pending, the Democratic National Committee (DNC) sought a declaratory ruling from the Commission that a "broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues."[8] DNC complained of no individual refusal to sell it time, rather it sought a general ruling.

The Commission ruled against both BEM and DNC on the same day in separate but cross-referenced opinions. (Pet. App. B and App. C.) Although there was no evidence of any harm to WTOP if it carried BEM's editorial advertisements – indeed WTOP never asserted it would suffer any injury by carrying them – the Commission sustained WTOP's flat ban on controversial short editorial advertisements. It stated that a licensee's obligations under the fairness doctrine[9] "to present *representative* community

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[7] (continued) respectively.) Although BEM is not a respondent in the last mentioned proceedings (Nos. 71-863 and 71-866), this Brief in Opposition is directed to all Petitions since the court below issued one inseparable decision in both *DNC* and *BEM*.

[8] Initially DNC seemed to be requesting a declaratory ruling covering both program length time segments and spot advertising time. But the Commission and the Court of Appeals treated it as dealing with spot advertisements only. See text following this note. Therefore as noted in the text, *supra*, all that is before the Court is the advertising time held out for sale to the public by broadcasters.

It should also be noted that the ruling requested by DNC did not deal with paid political ads on behalf of political candidates or in support of ballot propositions. These paid ads are widely accepted, but only during election campaigns. *Cf.* Communications Act of 1934, Section 315(a), as amended, 47 U.S.C. §315.

[9] Pet. 6.

views on controversial issues . . ."[10] was adequate under both the public interest standard and the First Amendment[11] to implement our "'profound national commitment that debate on public issues should be uninhibited, robust, and wide open.'"[12] The Commission noted that Section 3(h) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §153(h), declares that broadcasters are not "common carriers." It implied that to require any broadcaster to sell some of its spot advertisement time to someone at sometime might be inimical to this provision.[13]

In *DNC*, the Commission employed essentially the same grounds for refusing to rule that broadcasters must abandon flat bans on the sale of time to responsible entities seeking to comment on controversial issues.[14] Although DNC's request for a declaratory ruling of a general nature clearly invited a far reaching inquiry in which the Commission could gather relevant facts as to existing practices in the industry and the possible effects of such a ruling, the Commission acted without the benefit of such proceeding.

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[10] Pet., App. C, p. 101a, quoting *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 394 (1969).

[11] Pet. App. B, pp. 68a-69a, ¶28.

[12] Pet., App. B, p. 61a quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

[13] See Pet. App. C, p. 100a-101a. The Commission relied on its reasoning in *Democratic National Committee*. See text following this note.

[14] The Commission did, however, hold that it would be arbitrary and contrary to the public interest for a licensee to refuse to sell time to the DNC or other significant political parties for the purposes of soliciting funds. Pet., App. B, pp. 72a-75a. No party below sought review of this determination and its rectitude is *not* before this Court.

BEM and DNC each filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. After briefing and argument in both *DNC* and *BEM*, but over seven weeks before issuance of the Court of Appeals' decision, the Commission initiated a general inquiry into the fairness doctrine.[15] Even though the Commission's *BEM* and *DNC* decisions stood at the time the general inquiry was launched, one aspect of this overall review was directed to a determination whether and under what conditions a limited right of individual access of the sort sought by *BEM* could and should be exercised[16] (this aspect is hereinafter referred to as "the Inquiry"). Because of its direct pertinence to the issues raised by petitioners, we quote the Inquiry in full:

> **ACCESS GENERALLY TO THE BROADCAST MEDIA FOR THE DISCUSSION OF PUBLIC ISSUES**
>
> 19. It has also been urged that, quite aside from the fairness obligation of broadcasters, there is a right of access – at least on a paid basis – for all those wishing to express a viewpoint on a controversial public issue. The Commission has rejected this blanket claim on the ground that there is neither Constitutional nor statutory right for any individual or group to present their views, and that as a matter of policy it would not serve the public interest to act as if there were. See, *e.g.*, the *Democratic National Committee* ruling, 25 FCC 2d 216 (1970), appeal

[15] *Study of Fairness Doctrine*, 30 F.C.C. 2d 26, 36 Fed. Reg. 11825 (1971).

[16] *Id.* at 33.

pending, *Democratic National Committee v. F.C.C.*, Case No. 24,537, C.A.D.C.; *Business Executives' Move for Vietnam Peace v. F.C.C.*, Case No. 24,942, C.A.D.C. The legal issues are thus before the Court, and the policy issues are sharply pointed up in the majority and minority opinions of the Commission. We request comment on the question *whether there is any feasible method of providing access for discussion of public issues outside the requirements of the fairness doctrine.* More specifically, we ask that comment be addressed to the differing problems raised by paid and free time; the specific standards that should be followed for determining the basis on which time is to be provided, if such a course is recommended; the effect of any such new procedure on the licensee's general responsibility to the public; and the impact of such procedure on the licensee's duties under the fairness doctrine. *The essential purpose of this part of the inquiry is to ascertain, if possible, the general patterns of licensee practice as to access on a paid or sustaining basis (e.g., for discussion of controversial issues generally* or of ballot issues; for fund solicitation generally or for parties or committees organized around ballot issues), and *whether it would be appropriate for this Commission to lay down criteria or guidelines for these purposes. If so, what would they be?* Or, are the problems in this area so varied that decisions should be left to the judgment of thousands of licensees and, in cases of complaint, to the adjudicatory process? *In other words:*

should we reaffirm present Commission policy and practice? (Inquiry, *supra*, 30 F.C.C. 2d at 33 (emphasis added).)

On August 3, 1971, the court of appeals issued a single opinion reversing the Commission's orders in both *BEM* and *DNC*. Relying on *New York Times Co. v. Sullivan, supra*, Judge Wright, writing for himself and Judge Robinson,[17] stated that editorial advertisements are an important form of speech.[18] This Court has repeatedly stressed that such forms of expression must, under the First Amendment, be afforded access to speech forums.[19] An "unbroken line of authority"[20] has held that once the operators of such forums have opened them to speech, they may not discriminatorily bar controversial speech.[21]

In the face of these precedents, the court struck down the flat ban policy under challenge. It left undisturbed all

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[17] Judge McGowan dissented.

[18] Pet., App. A, pp. 28a-29a.

[19] *E.g., Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (public schools); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) (privately owned shopping center); *Cox v. Louisiana*, 379 U.S. 536 (1965) (state capitol grounds); *Marsh v. Alabama*, 326 U.S. 501 (1946) (company town). The court below relied on *Red Lion, supra*, and *inter alia*, on these cases to establish that state action standards could be applied to broadcasters in the First Amendment area.

[20] See Pet., App. A, pp. 30a-31a.

[21] See cases cited at *ibid.* See *Cox v. Louisiana, supra; Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

other aspects of the regulatory scheme.[22] Indeed, because this case came to the court below from an administrative agency charged with primary regulatory responsibilities in this area, an agency which may draw upon its own expertise and that of its licensees, the court did not order that BEM's, DNC's or any other specific group's advertisements must be accepted by any broadcaster. Rather it confined itself

> to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many "editorial advertisements" will be put on the air. (Pet., App. A, p. 3a.)

It directed only that

> [o]n remand, the Commission should develop reasonable regulatory guidelines to deal with editorial advertisements. (Pet., App. A, p. 44a.)

The court took note of another reason for proceeding with caution: there are the severe limitations on broadcast time[23] which make it "idle to posit an unabridgeable First Amendment right to broadcast"[24] in a medium that "inherently is not available to all."[25] The court therefore made clear that any right of paid access to the broadcast

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[22] These include the fairness doctrine, a licensee's obligations to consult with community leaders, to provide programming of different types, etc.

[23] Pet., App. A, p. 37a.

[24] *Red Lion, supra* at 388.

[25] *National Broadcasting Co. v. United States,* 319 U.S. 190 226 (1943).

media must be a "reasonably regulated 'abridgeable'" [26] or "*limited*" right to speak. [27]

On Petitions for Rehearing and Suggestion for Rehearing en Banc, the full court, without dissent, denied the request for *en banc* rehearing and the petition for rehearing was denied by Judges Wright, Robinson and McGowan without dissent. The petitioners now seek to have this Court issue a writ of certiorari to review the judgment of the court of appeals.

At the time the petitions for certiorari were filed, the Solicitor General, [28] with the support of the broadcaster-petitioners, sought a stay. In the Application for Stay, the Solicitor General informed the Court that the Commission has suspended the "Access Generally To The Broadcast Media For The Discussion of Public Issues" phase of the *Study of Fairness Doctrine* proceeding – *i.e.*, the Inquiry (Application for Stay, p. 4.). Other than to note that certiorari is being sought, neither the Solicitor General nor the Commission has articulated any reason why the Inquiry, which was deemed necessary prior to the decision of the court of appeals, is less pressing now.

By order of this Court dated January 24, 1972, the stay was denied as follows: "The application for a stay presented to the Chief Justice, and by him referred to the Court, is denied."

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[26] Pet., App. A, p. 22a.

[27] *Id.*, p. 8a. (Emphasis in original.)

[28] As counsel for both the United States of America and the Commission.

REASONS FOR DENYING THE WRIT

I. PRELIMINARY ANALYSIS OF COURT OF APPEALS' DECISION

At the outset, it is useful to make clear what was and what was not held by the court below:

> The . . . issue before us is relatively narrow and we decide it narrowly. We do not have to cut to the "heart" of our system of broadcasting; we leave undisturbed the licensee's basic right to exercise judgment and control in public issue programming and the sale of advertising time. All we do is forbid an *extreme*[29] form of control which totally excludes controversial public debate from broadcast advertising time.
>
> We hold specifically that a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted. We do *not* hold, however, that the planned announcements of the petitioners – or, for that matter, *of any* other *particular applicant* for air time – *must necessarily be accepted* by broadcast licensees. Rather, *we confine ourselves to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations* determining *which* and *how many* 'editorial advertisements' will be put on the air. Pet., App. A, p. 3a. (Emphasis added, except as noted.)

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[29] Emphasis in original, this footnote added.

The court specifically did not order any broadcaster to put anyone in particular, not even BEM, on the air. Rather, it clearly refused to treat broadcasters as common carriers relegated to selling their air time to all comers; it did not even require any broadcaster to accept any particular editorial advertisement, much less every one proffered,[30] and it made clear that, at this point, it leaves "up to the licensees and the Commission" the working out of a reasonable approach to selling some spot advertising time to persons wishing to speak on matters of public controversy.

The fairness doctrine, which was upheld by this Court in *Red Lion*, is not in any way affected by the court of appeals' decision; the Commission's and its licensees' discretion as to application and administration of that doctrine remain unaltered.

In contrast to petitioners' repeated arguments that the result reached by the court below is inconsistent, at odds with, or otherwise in conflict with this Court's *Red Lion* decision,[31] the court below went to great lengths to

[30] Thus, petitioners' repeated citations of *Red Lion, National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), *Green v. F.C.C.*, 447 F.2d 323 (D.C. Cir., 1971), and other cases for the proposition that no single person has an absolute right to express his views on radio or television address an issue not present in this case. Those decisions are not in any way inconsistent with the ruling below. Indeed, as noted *supra*, see p. 10, the court below was exceptionally sensitive to the time limitations and other problems faced by broadcasters as well as the regulatory obligations of the Commission and therefore articulated "a reasonably regulated, 'abridgeable' right to speak" (Pet., App. A, p. 22).

[31] *See, e.g.*, Pet. 11, 12; CBS Pet. 11, 13; Post Pet. 9 ("The lower court's decision stands *Red Lion* on its head."); ABC Pet. 5, 9.

emphasize that its result was consistent with the spirit of *Red Lion:*

> The *Red Lion* Court itself stated specifically that "[i]t is the purpose of the First Amendment to preserve an *uninhibited* marketplace of ideas [in the broadcast media]."[32] (Pet., App. A, at 21a.)

The court below stressed that this Court in *Red Lion,* while upholding the fairness doctrine as constitutionally permissible and consistent with First Amendment objectives, in no way suggested, let alone held, that the fairness doctrine exhausts all of the broadcaster's obligations or protects all of the public's First Amendment rights regarding the broadcast media:

> Surely the public's interest in free access to the full spectrum of ideas and controversial views on radio and television is highly important. The right to receive ideas and information is deeply rooted in First Amendment law.[33] The *Red Lion* Court stressed that right, since it was the one primarily relevant to the fairness doctrine rules at issue in the case. But we do not believe that the *Red Lion* decision makes the goal of an informed public the *exclusive* First

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[32] Footnote 29 to opinion: "395 U.S. at 390. (Emphasis added.)"

[33] Footnote 28 to opinion: "*See Stanley v. Georgia,* 394 U.S. 557, 564 (1969); *Lamont v. Postmaster General,* 381 U.S. 301, 307-308 (1965) (Mr. Justice Brennan, concurring); *Martin v. City of Struthers,* 319 U.S. 141, 143 (1943). The right to receive, however, has not been considered the central First Amendment interest, and never the only First Amendment interest."

> Amendment interest constraining broadcasters. Certainly the Supreme Court has done so in no other context. (Pet., App. A, at 21a.)

All that the court held is that where a preferred form of speech[34] is at stake, the First Amendment requires that the Commission must "cease abdicating responsibility over the uses of advertising time" (App. A., p. 2a) to the *sole and unfettered* discretion of its licensees.

In short, the court has merely asked the Commission to develop guidelines to assure that the free speech rights and interests of the public are not unreasonably foreclosed. As for broadcasters, they simply have been instructed to exercise their professional competence and judgment to assure that *some* members of the public at *some* time have *some* opportunity to purchase access to *some* portion of the airwaves that that same public owns for presenting *some* of its views on *some* controversial issues of the day.

In sum, the court below merely suggested that broadcasters must make reasonable efforts in the selling of advertising time to behave like the able and benign "trustees" of a highly valuable public resource that they should be[35] and claim to be.[36]

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[34] *New York Times v. Sullivan, supra,* and *Valentine v. Chrestensen,* 316 U.S. 52, 54 (1942).

[35] *See* Pet. at 10-11. *See* also *Office of Communications of United Church of Christ v. F.C.C.,* 425 F.2d 543, 548 (D.C. Cir., (1969), emphasizing that broadcasters are "fiduciaries . . . of a great public resource and must meet the higher standards which are embraced in the public interest concept."

[36] See, *e.g.,* Pet., *op. cit.*; CBS Pet. 6, 15.

II. THE CASE AND ISSUES INVOLVED ARE NOT RIPE FOR REVIEW IN THIS COURT

Summary

The court below made clear that its decision is constitutionally grounded, specifically in the First Amendment.[37] All petitioners argue that this case presents questions of major constitutional import. While we do not deny that imbedded within the court of appeals' decision may lie major constitutional questions[38] that might be appropriate for review by this Court if presented in a context which would permit this Court an opportunity to thoroughly analyze their implications to the nation's broadcasting industry and the public, this is not such a case.

There is no factual record whatever in support of any of the assertions of disruption of orderly broadcasting or financial injury made by petitioners.[39]

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[37] Pet., App. A., p. 10a.

[38] A few possible problems which *might* arise in implementing a paid editorial access scheme (when one is formulated by the Commission), could include censorship of content or format of editorial advertisements by licensees or, on the other hand, impairment of a licensee's role as journalist (see fn. 44, *infra*, and accompanying text) as a result of the nature or number of editorial advertisements he must carry.

[39] The declaratory ruling sought by DNC gave the Commission a clear opportunity to develop a factual record on these and the other issues raised by petitioners, before issuing its decision. It eschewed this course of action but, as noted above, acknowledged the *need* for such an evidentiary approach to the problems raised in this case by initiating its Inquiry on June 12, 1971. See pp. 7-9, *supra*.

Nor is there any evidence before this Court concerning the possible burdens the Commission might suffer if forced to implement the mandate of the court below,[40] which, in effect, simply requires the Commission to continue the Inquiry it had itself begun and which leaves the Commission almost unfettered discretion to work out rules in which it could protect itself and the courts from a plethora of litigation.[41]

Nor is there any agency rule or regulation before this Court, let alone one based upon a thorough analysis of the factual and legal parameters. Cf. *Red Lion, supra.*

In short, the record presented to this Court is bare. Furthermore, both the Commission and the broadcasters have been afforded wide latitude to hammer out a fair and reasonable approach to editorial advertising. Under these circumstances, it is premature for the Court to grapple with the constitutional principles underlying the decision below. The case is not ripe for review.

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[40] It should be noted that mere inconvenience to or burden on a governmental body, unless it is demonstrably severe, both quantitatively and qualitatively, has never been regarded as a permissible ground for denying First Amendment protected rights. *See, e.g., Gregory v. City of Chicago,* 394 U.S. 111 (1969) and *Edwards v. South Carolina,* 372 U.S. 229 (1963). It is especially ironic to hear a regulatory agency like the Commission seek to be relieved of its statutory obligations on the ground that enforcing First Amendment rights may prove a burdensome task.

[41] It should be noted that the Commission concedes that its Inquiry might well reach a result "similar to that ordered by the Court of Appeals . . . ." (Pet. 15).

Discussion

The decision below does not alter broadcaster control over programming time.[42] Nevertheless, the broadcaster petitioners argue that if they are required to provide the public with limited paid access they will be deprived, in part because of the fairness doctrine,[43] of some control over issue origination and speaker format and language.[44] Moreover, petitioners express concern that under the Commission's *Cullman*[45] doctrine, the licensee might incur an

[42] As the court below stated: "It is particularly important that these cases deal only with the public's First Amendment interests in broadcasters' allocation of advertising time. They deal only with *time relinquished by broadcasters to others*. . . . In normal programming time, closely controlled and edited by broadcasters. . . . the broadcasters' own interests in free speech are very, very strong. [Footnote omitted.] The Commission's fairness doctrine properly leaves licensees broad leeway for professional judgment in that area. But *in the allocation of advertising time, the broadcasters*[']. . . *speech is not at issue; rather all* that is at issue is *their decision as to which other parties will be given an opportunity to speak.*" Pet., App. A, pp. 19a-20a (emphasis added).

[43] The fairness doctrine imposes a two-fold obligation on licensees. First, they must air views on some controversial issues of their own choosing. Second, the views they present as to those issues must be balanced. See Pet. at 6. *Cf.* Brief for Respondents United States of America and Federal Communications Commission, below, at pp. 12-13: ". . . licensees have a general obligation to devote a reasonable portion of broadcast time to the discussion of controversial issues of public importance, and in doing so, to be fair, *i.e.*, to affirmatively present contrasting viewpoints held by responsible elements in the community."

[44] ABC Pet. 12; CBS Pet. 15; Post Pet. 10.

[45] *Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963). *Cullman* requires a broadcaster to present contrasting viewpoints at its own expense if paid sponsorship is unavailable. There is of course no direct economic threat from any access accorded groups as a result of the decision below. The decision deals only with the right to purchase spot announcement time; ABC's implications to the contrary (ABC Pet. at 9-10) are wrong. See opinion below (App. 3a) quoted, *supra*, at p. 12.

economic burden in meeting fairness doctrine obligations. Petitioners also warn that the national agenda of public issues which reach the airwaves may be unduly influenced by an invalid factor – *i.e.*, the wealth required to purchase editorial advertising time.[46] Finally, petitioners raise the related spectres of "administrative apocalypse"[47] and ominous governmental censorship through agency and court review of licensee decisions.[48]

At some point there may arise a real and documentable cause for concern that even a *limited* system of paid access might result in one or more of the dangers so strenuously argued by petitioners. But at this time the dangers are pure speculation[49] and sound principles of constitutional adjudication, which are designed to ensure that any judgment of this Court be both necessary and fully informed, inveigh against Supreme Court review of this case.[50]

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[46] Pet. 17, ABC Pet. 11-12, 15-16; CBS Pet. 15; WTOP Pet. 10.

[47] Pet., App. A, p. 40a.

[48] Pet. 11, 17; ABC Pet. 12-13; WTOP Pet. 10-11; CBS Pet. 16-17.

[49] *E.g.*, WTOP cites a total of *three* demands for time – one of which (*The Committee of One Million*, F.C.C. 71-1096 (October 22, 1971)) involved an attempt to purchase a program length segment, not a spot ad – as proving "it is only realistic to expect that demands for editorial advertising time will be numerous and widespread." (WTOP Pet. 16, n. 16.)

[50] See *United States v. International Union, etc.*, 352 U.S. 567 (1952) (Frankfurter); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951) (Frankfurter concurring); *United States v. Lovett*, 328 U.S. 303 (1946) (Frankfurter concurring); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936) (Brandeis concurring).

This Court refuses to involve itself "where administrative intention is expressed but has not yet come to fruition . . . ."[51] This Court's policy clearly is to rule on the legality of a regulation before it is put into effect only where the challenged regulation specifically details prescribed or proscribed conduct and leaves the implementing agency no leeway in its enforcement.[52] Only in this way can the true agency position be ascertained and properly analyzed.

Here, not only is there no rule or regulation before the Court, but the Commission, both in failing to build a record before disposing of DNC's request for declaratory ruling and in initiating and then staying its Inquiry (see p. 11, *supra*) has taken every step possible to delay the development of the rules or regulations regarding paid editorial advertising which both it (Pet. 15.) and the court below believe are required.

What this Court is asked to review is a remand to the Commission to explore, in light of First Amendment considerations, the adoption of rules that Agency was already considering adopting. This Court is asked to resolve a vital First Amendment issue in a vacuum, where all that is before it is a remand intended to lead to rules which themselves can (and assuredly will) be the subject of judicial review. The Commission and the licensees ask this Court to relieve them of the burden of compliance with their responsibility under the Communications Act to exercise their expertise

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[51] *Eccles v. Peoples Bank of Lakewood Village, Cal.*, 333 U.S. 426, 434 (1948).

[52] *Frozen Food Express v. United States*, 351 U.S. 40 (1956); *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

to develop workable rules for securing "the more effective use of radio."[53] The Commission, while professing that its policy role has been usurped and that the court below impermissibly intruded into its zone of expertise, now asks this Court to declare it unnecessary for the Commission to exercise its policy responsibility to apply that expertise in its own Inquiry.[54]

In similar situations this Court has held that "sound discretion withholds the remedy where . . . at the moment adjudication is sought, [the challenged practice is] undergoing significant modification so that its ultimate form cannot be confidently predicted."[55] Where constitutional adjudication is involved, this discretion becomes a "reluctance, indeed refusal, to undertake the most important and most delicate of the Court's functions . . . until necessity compels it . . .".[56] This Court will undertake constitutional adjudication only in a "concrete factual setting that sharpens the deliberative process especially demanded for a Constitutional decision."[57] All of these principles make the instant matter plainly inappropriate for review by this Court on the record before it.

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[53] Communications Act of 1934, Section 301, Stat. 47 U.S.C. §301.

[54] See Pet., pp. 10, 12; see also Pet. in No. 71-865, pp. 18-19.

[55] *A. L. Melching Barge Lines, Inc. v. United States*, 368 U.S. 324, 331 (1961).

[56] *Rescue Army v. Municipal Court*, 331 U.S. 549, 570 (1947).

[57] *United States v. International Union, etc.*, 352 U.S. 567, 591 (1957). See also *Parker v. County of Los Angeles*, 338 U.S. 327 (1949), *Simmons v. West Haven Housing Authority*, 399 U.S. 510 (1970), rehearing denied, 400 U.S. 856 (1970).

On the slender record in this case there is no basis whatever on which to determine at what point, if any, any of the speculative dangers advanced by petitioners will arise to the level of reality.[58] In *Toilet Goods Association v. Gardner*, 387 U.S. 158, 163-4 (1967) this Court stated that its determination of the legality of a Food and Drug Administration regulation[59] required "not merely . . . an inquiry into statutory purpose, but concurrently . . . an understanding of what type of enforcement problems are encountered by the FDA, the need for various sorts of supervision in order to effectuate the goals of the Act, and the safeguards devised to protect legitimate trade secrets." It is plain that, on the record in the instant case, this Court could not possibly reach such an understanding of the regulatory problems which are hypothesized by petitioners. Where questions of "far reaching impact" are pressed for decision, "adequate and full bodied record is required."[60]

The Commission's now aborted *Study of Fairness Doctrine*, initiated prior to the court's decision, was specifically designed to determine if any of the dangers that have been asserted (but nowhere documented) as realities by petitioners might arise. The Notice of Inquiry

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[58] It seems plain, for example, that a rule which required broadcasters to carry only one editorial advertisement per 24 hour period would not trigger the consequences which petitioners fear. At the other extreme, a rule which prohibited any commercial advertisements even when all customers for editorial advertisements were satisfied would raise serious issues.

[59] That case involved a "final" agency regulation, unlike the present facts which involve nothing more than an *ad hoc* adjudicative ruling.

[60] *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 113 (1962)

explicitly contemplates that it may be workable to provide limited paid access for editorial advertisements:

> We request comment on the question whether there is any feasible method of providing access for discussion of public issues outside the requirements of the fairness doctrine. More specifically, we ask that comment be addressed to the differing problems raised by paid and free time; the specific standards that should be followed for determining the basis on which time is to be provided, if such a course is recommended; the effect of any such new procedure on the licensee's general responsibility to the public; and the impact of such procedure on the licensee's duties under the fairness doctrine. *Study of Fairness Doctrine*, 30 F.C.C. 2d at 33.[61]

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[61] The court considered the arguments advanced here by petitioners and rejected each of them as too speculative. Pet., App. A, pp. 36a-42a. BEM's brief (at 37-52) and reply brief (at 24-31) in the court below deal extensively with each of these points and those discussions will not be repeated here. Moreover, we have already noted that some system of paid access is plainly feasible. But in view of the strenuousness with which the broadcasters have insisted that disaster will result from the decision below, it is useful to briefly note here some possible responses to some of the objections.

Contrary to the broadcasters' assertions (CBS Pet. at 8-9, 14-15; ABC Pet. at 6; *Cf.* Post Pet. at 10-11) the court did not limit the rules to be adopted to time, place and manner. ("*At the least*, there may be regulations determining the time, place, and manner of speech." Pet., App. A, p. 39a (emphasis added).) The court explicitly left open the possibility that it might be necessary to

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The Commission similarly concedes that it does not know whether (and, if so, under what criteria) broadcasters already are turning over substantial blocks of advertising time to the editorial spokesmen, be they wealthy or otherwise:

> The essential purpose of this part of the inquiry is to ascertain, if possible, the general patterns of licensee practice as to access on a paid or sustaining basis (*e.g.*, for discussion of controversial issues generally or of ballot issues; for fund solicitation generally or for parties or committees organized around ballot issues), and whether it would be appropriate for this Commission to lay down

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61 (cont'd) limit the amount of time sold to one group or to present a particular narrow viewpoint. Pet., App. A. p. 51a. (The court went so far as to say that respondent BEM's ads might be barred on these grounds in view of the extensive coverage given the Vietnam war. Pet., App. A, pp. 3a, 44a.) There is, in any event, no evidence in the record indicating that enough editorial advertising will come forward to in any way threaten a licensee's balanced programming with respect to any issue in view of the broad discretion accorded licensees in achieving an overall balance in the presentation of opposing views. *Fairness Primer: Applicability of the Fairness Doctrine to the Handling of Controversial Issues of Public Importance,* 29 Fed. Reg. 10415 (1964). (It is not true that one spot ad may only be balanced with other spot ads. ABC Pet. at 10-11, 13, n. 7. See specifically In re *Wilderness Society, et al.*, 31 F.C.C.2d 729 (F.C.C. Memorandum Opinion and Order No. 71-971 (Sept. 17, 1971)).) The same "trustee" standards and approaches already used by broadcasters in choosing among competing ideas and speakers under the fairness doctrine could, for example, merely be extended to licensees making choices among competing applicants for paid access.

criteria or guidelines for these purposes. (*Ibid.*)[62]

It is clear that some broadcasters already accept some editorial advertisements.[63] (See Post Pet., p. 14.) There is not one scintilla of evidence in the record that any of those broadcasters suffer any of the horrors postulated by petitioners. Surely the guidelines employed and the

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62 Again the court directly dealt with the argument that the wealthy would dominate the national agenda. Pet., App. A, pp. 40a-41a. The guidelines developed in the fairness area are of course relevant. See note 1, p. 17 *supra*. Moreover, the right of paid access recognized by the lower court is a complement to, not a substitute for, the fairness doctrine. Since the application of the latter doctrine is left intact by the lower court's decision, it would operate to assure that no particular group, point of view or issue could preempt the airways, no matter the number of dollars at its command.

In any event, by the very nature of commercial media, the wealthy have always had greater access to public forums than the under-financed. It would be anomalous to preclude the latter groups because of the fear that their limited right of access will further entrench the access of the wealthy. Even a benign and paternalistic broadcaster controlling all access (*cf.* ABC Pet. No. 71-866, 5, 8; CBS Pet. No. 71-863 at 15) may inadvertently overlook the views of such groups. When they do manage to raise the money to present an editorial, flat bans will clearly preclude their self-expression. Moreover, even less than wealthy persons might be able to afford to purchase one spot announcement and, in it, request funds to finance additional ones. *Cf.* F.C.C. Opinion in *DNC*, Pet., App. B., at 72a-73a.

63 It is also clear that many commercial advertisements are in fact taking positions on controversial issues of public importance. See *Banzhaf v. F.C.C.*, 405 F.2d 1082 (D.C. Cir., 1968), *cert.*

(cont'd)

experience of such broadcasters is highly relevant to a determination of whether a regime of paid access for editorial messages is workable. And, in the Inquiry, the Commission expressed an open mind about whether such a system would result in administrative apocalypse. It asked:

> Whether it would be appropriate for this Commission to lay down criteria or guidelines . . . . If so, what would they be? Or, are the problems in this area so varied that decisions should be left to the judgment of thousands of licensees and, in cases of complaint, to the adjudicatory process? (Inquiry, pp. 7-9, *supra.*)[64]

The Commission concluded its Notice of Inquiry with a question:

> [S]hould we reaffirm present Commission policy and practice? (*Ibid.*)[65]

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[63] (cont'd) *denied sub nom Tobacco Institute v. F.C.C., 396* U.S. 842 (1969); *Friends of the Earth v. F.C.C.,* ___F.2d ___(D.C. Cir. No. 24,556, August 16, 1971); *Letter to National Broadcasting Co.,* 30 F.C.C. 2d 643 (F.C.C. 71-704, June 30, 1971).

[64] Neither administrative anarchy nor censorship is any more likely under a system of limited paid access than already exists under the fairness doctrine. Every refusal to broadcast a contrasting viewpoint is also potentially the subject of a complaint to the Commission and of court review.

[65] The Commission's stated intention to investigate the extent to which a system of limited paid access is feasible must of course silence any protest that such a system violates the statutory scheme. (cont'd)

In the face of the "woefully lacking"[66] record in this case, only a showing of extreme "hardship" might justify a decision by this Court.[67] This has been the consistent position of this Court in cases involving even administrative regulations.[68] Where First Amendment rights are involved, the showing of hardship imposed on the person silencing speech must be concomitantly greater.[69]

This Court's refusal to review at this time would inflict no real harm on any of the petitioners. The broadcasters have not been ordered to sell spot announcement airtime for any specific editorial advertisements. The

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65 (cont'd) It is repeatedly contended (Pet. at 3; CBS Pet. at 10-11; Post Pet. at 3; ABC Pet. at 9) that the limited system of paid access sought by respondent would convert licensees into common carriers in violation of Section 3(h) of the Communications Act, 47 U.S.C. §153(h). Section 315 is cited in support of this proposition. While the court disposed of these contentions on the merits, (Pet. App. A, pp. 37a-38a) the Commission could not have reached the same result in its Inquiry if this violated the statute. The Commission was clearly cognizant of Section 3(h). It opened the Inquiry with explicit mention of its duty to abide by this provision. 30 F.C.C. 2d 26-27. Yet consistent with that duty, it proposed a study of a limited right of paid access.

66 *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 113 (1962).

67 *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

68 *Toilet Goods Association, supra*, 387 U.S. at 162-166.

69 See *Near v. Minnesota*, 283 U.S. 697 (1931).

case has simply been remanded to the Commission to determine under what circumstances some members of the public may be entitled to air their ads.[70] The Commission for its part, had already begun a proceeding to gather data it needs to determine the conditions under which a limited system of paid access could be implemented. No untoward burden is imposed on the Commission by requiring it to resume that proceeding which it has unexplainedly suspended.

In the delicate area of speech, this Court has long recognized that the Constitution requires that persons be afforded the broadest *possible* opportunity for self expression.[71] Before restricting or expanding the "breathing space"[72] which speech via the broadcast media enjoys, this Court should have some notion of what are likely to be the effects of a system of limited paid access. In *Red Lion*, the Court was presented similar protestations of doom by the broadcasting industry regarding the application of the fairness doctrine.[73] If the personal attack and political editorialization doctrines of the Commission were allowed to stand, it was argued, the result

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[70] It is true that even before the Commission promulgates final guidelines, broadcasters will have to abandon flat bans to editorial advertisements. If this creates serious problems, the courts are as available to broadcasters as to private parties.

[71] See *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940), holding that governmental restrictions on speech must be narrowly drawn "so . . . as not, in attaining a permissible end, unduly to infringe upon the protected [First Amendment] freedom." See also *Cox v. Louisiana, supra*, and *Edwards v. South Carolina*, 372 U.S. 229 (1963).

[72] *NAACP v. Button*, 371 U.S. 415, 433 (1963).

[73] See *e.g.*, briefs of CBS and National Broadcasting Co. in *Red Lion, supra.*

would be to deter speech because of the obligation to present opposing views.[74] The Court responded that:

> that possibility is at best speculative. The communications industry, and in particular the networks, have taken pains to present controversial issues . . . . And if experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications. (*Red Lion*, 395 U.S. at 393.)[75]

Here, too, there will be time enough to review the workability of a regime of limited paid access in the light of experience. A premature review could indeed result in a "constitutional straight-jacket" which might either over-protect or under-protect speech.

The case is plainly not ripe for review.

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[74] It is ironic, to say the least, to now find the broadcasters citing the fairness doctrine as the panacea for public rights with which they can comfortably live.

[75] To the extent timorousness has resulted from the chilling effect of the fairness doctrine, (see *Red Lion, supra* at 393-94) some system of limited access suggested by the court below provides one means of assuring some amelioration. See, *e.g.*, Pet., App. A, pp. 24a-25a.

III. THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT

Citing two superannuated decisions in other circuits – *McIntire v. William Penn Broadcasting Co.*, 151 F.2d 597 (3rd Cir., 1945) *cert. denied*, 327 U.S. 779 (1946) and *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir., 1950) – the three broadcaster petitioners allege that the decision below creates a direct conflict among the circuits.[76]

The Solicitor General, on the other hand, eschews making any such argument. Rather, noting that the Commission's report, *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, was not adopted until 1949 and its *Fairness Primer, supra*, was not published until 1964, the Solicitor General merely cites the *McIntire* and *Massachusetts Universalist* decisions as reaffirming licensee discretion "to determine what *programming* is in the public interest." (Pet. 14, fn. 6. Emphasis added.)

Examination of the *McIntire* and *Massachusetts Universalist* cases indicates that they are in no way in conflict with the decision below. First, both cases involved the sale of *programming* time, not spot announcement time, whereas the court below made clear that *its decision was limited to the latter form of time, i.e.*, that time which commercial broadcasters hold out for sale to members of the public.

Second, both *McIntire* and *Massachusetts Universalist* involved actions brought in U.S. District Courts to require broadcasters to sell airtime. The dispositive rationale

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[76] ABC Pet. 14-16; CBS Pet. 17-19; Post Pet. 11-14.

of both cases was that the district courts lack jurisdiction to entertain such actions since the Communications Act vested in the Commission "the power to pass upon all such allegations of unfair treatment as the plaintiffs made here respecting the defendant." (*McIntire, supra,* 151 F.2nd at 597; *Massachusetts Universalist, supra,* 183 F.2nd at 500, citing *McIntire.*)[77]

Third, neither *McIntire* nor *Massachusetts Universalist* involved a *flat* ban on political speech, but rather involved the cancellation of a specific speaker's contract to purchase programming time. Thus, those cases involved none of the questions of discrimination against political speech in favor of commercial speech which, in part, persuaded the court below to reach its result. The cases are fully consistent with the narrow ruling of the court below which simply invalidated "the flat ban [against selling editorial advertising time] alone leaving it up to the licensees and the Commission to develope and administer reasonable procedures and regulations determining which and how many editorial advertisements would be put on the air."[78]

Finally, to the extent that *McIntire* and/or *Massachusetts Universalist* suggested, by way of dictum,[79] that the

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[77] See also *Retail Store Employees Union, Local 880 v. F.C.C.* 436 F.2d 248, 256 fn. 49 (D.C. Cir., 1970): "since *McIntire* merely held that regulation of program content was within the province of the Commission rather than the district courts, the citation can hardly be regarded as illuminating."

[78] Pet., App. A, p. 3a.

[79] Any statement regarding the application of the First Amendment was dictum in those cases because, as noted above, they were grounded upon determination that district courts lacked jurisdiction to entertain the complaints.

First Amendment does not govern the operations of broadcasters in allocating their airtime, that notion has been firmly put to rest by this Court in *Red Linon, supra,* at 386: "broadcasting is clearly a medium affected by a First Amendment interest . . . ."

Thus, as recognized by the Solicitor General, the two ancient cases cited by the broadcaster petitioners are not in conflict with the decision below. At best they take a different point of view on other issues (sale of programming, not spot announcement, time and the jurisdiction of the district courts) which arose in a context prior to the advent of the Fairness Doctrine and this Court's affirmation in *Red Lion* that the First Amedment clearly must govern the way in which a broadcaster deals with controversial issues of public importance.

CONCLUSION

For the reasons above stated, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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February, 1972

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-863

COLUMBIA BROADCASTING SYSTEM, INC.,
Petitioner,

v.

DEMOCRATIC NATIONAL COMMITTEE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

I

Neither the opposition of the Democratic National Committee ("DNC"), respondent in this case, nor the opposition of Business Executives' Move for Vietnam Peace ("BEM"), respondent in two related cases,[1] disputes that the decision of the court below raises novel and important

[1] *FCC* v. *BEM and DNC*, No. 71-864; *Post-Newsweek Stations, Capital Area, Inc.* v. *BEM*, No. 71-865. Those petitions seek review of the same court of appeals opinion as is involved here and in No. 71-866, *American Broadcasting Companies, Inc.* v. *DNC*. BEM has filed its brief opposing certiorari in all cases, including those in which it is not a respondent.

questions.[2] Indeed, BEM concedes that "major constitutional questions" may lie "imbedded within the court of appeals' decision" and "might be appropriate for review by this Court" if presented in some other context. BEM Opp. 16. Moreover, neither respondent seriously disputes that the court of appeals' decision will undermine the existing Congressional scheme of regulation.[3] Both DNC and BEM argue, however, that this case is not "ripe" for review by this Court because the court of appeals has directed the Commission to implement the decision through further rulemaking.[4]

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[2] In addition, DNC admits that there may be an "apparent" conflict between the decision below and *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946), but suggests that this "is certainly not a conflict that requires resolution by this Court." DNC Opp. 22. Contrary to DNC's suggestion, the rejection by the Third Circuit in *McIntire* of a First Amendment claim of a right to purchase time was an alternative holding, not dicta. This is confirmed by the Third Circuit's subsequent decision in *Avins* v. *Rutgers*, 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968), which, as we pointed out in our petition (pp. 18-19), clearly relies on *McIntire* as a First Amendment decision. We did not suggest in the petition that the *Avins* decision itself is in conflict with the decision of the court below in this case, but rather that it confirms that the *McIntire* decision is in conflict with that decision, and that the authority of *McIntire* has not been eroded by the passage of years.

[3] As we have pointed out, the Communications Act of 1934 embodies a strong Congressional purpose to leave programming choices in the hands of licensees as trustees for the public. CBS Petition, pp. 10-11; App. D. 14-15. In the one area where Congress has departed from this general policy it has deliberately chosen to carve out a narrowly circumscribed exception, creating in Section 315 of the Act specific rights in candidates for public office. In a very recent amendment to Section 315—Public Law 92-225, February 7, 1972—Congress has sought to ensure that candidates for federal office will be able to purchase a "reasonable" amount of time. This recent legislation, enacted following the court of appeals' decision, reflects the continuing Congressional policy not to extend individual rights to purchase time beyond the political campaign field.

[4] DNC Opp. 12-19; BEM Opp. 16-29.

It is ironic that DNC and BEM, who sought and obtained a sweeping constitutional decision from the court of appeals requiring the Commission to embark on an entirely new regulatory course, now argue that this Court should not review this novel constitutional holding until the Commission has completed rulemaking. Before the court of appeals, DNC and BEM did not suggest that this case was not ripe for decision, even though—as they now emphasize [5]—the Commission's fairness doctrine inquiry had been initiated prior to the court of appeals' decision.[6] DNC and BEM fail to explain how what was apparently quite ripe for decision by the court of appeals is suddenly not ripe for review by this Court.[7]

In fact, the ripeness argument misconceives the nature of the decision below and what is at issue in this case. The question presented to the court of appeals and this Court is not whether a Commission rule requiring the sale of advertising time for public issue discussion would be appropriate or legal, but whether such a rule is constitutionally compelled. The court of appeals' holding on this point is clearly ripe for review. For nothing that the Commission might do on remand or in its fairness doctrine inquiry can change or affect that decision; in Judge McGowan's apt phrase, the Commission is placed in a "constitutional straitjacket." [8]

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[5] DNC Opp. 14; BEM Opp. 22-23.

[6] *Notice of Inquiry*, Docket No. 19260, 30 F.C.C.2d 26, 33 (1971).

[7] Indeed, the argument of BEM and DNC that this case is not ripe for review by this Court because of the pendency of Commission rulemaking proceedings should not, if carried to its logical conclusion, result in a denial of certiorari. Rather, it would suggest that the Court should vacate the judgment of the court of appeals below (as having been rendered in a case not then ripe for review), and should remand the case to the Commission to conduct its fairness doctrine inquiry free of the constitutional straitjacket imposed by the court of appeals.

[8] App. A 44. (App. —— references are to the Appendices to the Petition for Certiorari in this case.)

The new notice of inquiry issued by the Commission in compliance with the court of appeals' mandate plainly indicates that the Commission believes that it is bound by a rigid constitutional requirement and that it is not free to implement its own conception of the public interest.[9] Acting under the constraints of the decision below, the Commission's rulemaking cannot involve the exercise of administrative discretion and expertise which would be of assistance to this Court in resolving the difficult constitutional issues presented by this case.

Under the well-settled practice of this Court, the court of appeals' remand of the case to the Commission for further proceedings in no way detracts from the appropriateness of review. Remands are characteristic in cases involving review of agency decisions, including decisions in the communications field, where this Court has been at pains to remind the courts of appeals of the limitations of the judicial review function and the necessity of agency implementation of decisions on review. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). Indeed, some of this Court's major decisions in the communications field have come upon grants of certiorari in cases in which the court of appeals had remanded the matter to the Commission for further action. *E.g.*, *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); *FCC* v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265 (1949); *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940).[10]

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[9] *Further Notice of Inquiry*, Docket No. 19260, FCC 72-117, released Feb. 7, 1972.

[10] Similarly, in the exercise of its jurisdiction to review decisions of the courts of appeals, this Court has granted certiorari to resolve an "important and clear-cut issue of law that is fundamental to the further conduct of the case," even though presented by a judgment requiring further action to be taken by a district court. STERN & GRESSMAN, SUPREME COURT PRACTICE 180 (4th ed. 1969). And this Court has regarded it as particularly significant that the ruling below decided a serious constitutional question. *E.g.*, *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945).

II

Apart from questions of ripeness, the oppositions of DNC and BEM rest upon an unduly broad view of what the Commission held in this case and an unduly narrow view of the decision of the court below. The Commission did not, as respondents appear to suggest, bar broadcasters from presenting editorial advertisements or partisan viewpoints and give a "monopoly" of advertising time to commercial sponsors.[11] In fact, the Commission held that broadcasters are free to present editorial advertisements if they believe that to do so would serve the public interest.[12] Almost without exception, broadcasters do sell some time for such advertisements.[13] Moreover, the Commission emphasized in its decision in this case that broadcasters are obligated, in carrying out their responsibilities under the fairness doctrine, to present partisan voices in their news and public affairs broadcasts.[14] There has been no showing that broadcasters have not fulfilled that responsibility.

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[11] DNC Opp. 6.

[12] App. D 18.

[13] Thus, for example, candidates, their supporters and political parties have had ample opportunities to purchase time on the broadcast media during the frequent federal, state and local election campaigns characteristic of our political system. And Congress has recently amended Section 315 of the Communications Act, which provides "equal opportunities" for candidates, to seek to ensure that candidates for federal office will be able to purchase a "reasonable" amount of time. Public Law 92-225, Feb. 7, 1972. As to advertising time, CBS' policy is to sell such time to candidates, their supporters, political parties and spokesmen on ballot issues during election campaigns. In addition, CBS sells advertising time to political parties, outside of election campaign periods, for expression of views on public issues. See Brief for Intervenor Columbia Broadcasting System, Inc., in *DNC* v. *FCC*, D.C. Cir. No. 24,537, pp. 3-4.

[14] App. D 12. As noted in our petition (p. 5), CBS policy with respect to coverage of public issues provides substantial direct exposure for partisans and partisan views, on a free basis, as part of a total professional journalistic effort.

At the same time, respondents erroneously picture the court of appeals' decision as a narrow one which will not work a basic change in Commission policy. Thus, DNC's suggestion that "the Court below has required the Commission to do nothing more than it had already decided to do" [16] ignores the fact that the court of appeals' decision has placed the Commission in a constitutional straitjacket, requiring it to promulgate rules whether or not it regards such rules as sound policy or in the public interest.

BEM, in its attempt to minimize the significance of the decision below, states that the court of appeals "merely suggested that broadcasters must make reasonable efforts in the selling of advertising time to behave like the able and benign 'trustees' of a highly valuable public resource that they should be and claim to be." [16] Elsewhere, BEM suggests that the court's holding could be satisfied by extending to the sale of advertising time for the discussion of public issues "the same 'trustee' standards and approaches already used by broadcasters in choosing among competing ideas and speakers under the fairness doctrine." [17] This reassuring view of the scope of the decision of the court of appeals bears no resemblance to what the court actually said or held.

As we showed in our petition, the entire thrust of the decision below was a rejection of the exercise of journalistic discretion by broadcast licensees.[18] This is evident

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[15] DNC Opp. 15.

[16] BEM Opp. 15.

[17] BEM Opp. 24 n.61.

[18] CBS Petition, pp. 10-15. Compare a recent decision, also involving DNC, by another panel of the Court of Appeals for the District of Columbia Circuit, emphasizing the importance of licensee discretion in administering the fairness doctrine. *Democratic National Committee* v. *FCC*, —— U.S. App. D.C. ——, —— F.2d —— (No. 71-1637, decided Feb. 2, 1972).

from the language of the court's opinion. Judge Wright characterized the present regulatory scheme as one in which "licensees and bureaucrats decide what issues are 'important,' how 'fully' to cover them, and the format, time and style of the coverage." [19] The interests of the First Amendment can be satisfied, the court held, only if the Commission requires that individual members of the public have "initiative and editorial control," so that "partisans who feel strongly on particular issues may decide on their own to speak out and to speak out in their own way." [20] In sum, the decision below forces the Commission to deprive licensees of the responsibility and authority indispensable to the trustee function. It forces the Commission to create a vacuum to be filled by the haphazard choices of purchasers of advertising time, who are not publicly accountable and who have no duty to serve the public interest.

[19] App. A 23.

[20] *Ibid.*

CONCLUSION

For the reasons stated above and in the petition for certiorari, the writ should be granted.

Respectfully submitted,

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February 11, 1972

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-864

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

DEMOCRATIC NATIONAL COMMITTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES

We wish to bring two matters to the Court's attention.

1. On February 7, 1972, the Federal Communications Commission reopened Part IV of its inquiry

entitled "The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act" (App. A, *infra*, pp. 4 to 16). This part of the inquiry, which had been initiated before the decision of the court of appeals in this case, see Docket No. 19260, 30 F.C.C. 2d 26, 36 Fed. Reg. 11825,[1] had been suspended because of the Commission's intention to file a petition for a writ of certiorari and pending this Court's decision on the government's subsequent motion for a stay of the judgment of the court of appeals, as respondent Democratic National Committee pointed out, see Brief in Opposition, at p. 14 n. 10. In light of the Court's denial of a stay on January 24, 1972, the Commission has resumed Part IV of its inquiry in compliance with the mandate of the court of appeals. Accordingly, the Commission has asked for "comments which can be of assistance in developing reasonable guidelines governing the determination by licensees of which and how many editorial advertisements will be put on the air" (App. A, *infra*, p. 7).[2]

2. The newly enacted Campaign Communications Reform Act, Title I, P.L. 92-225, approved February 7, 1972 (App. B, *infra*, p. 17), amends the Federal Communications Act to require broadcast licensees to allow reasonable access to their facilities by candi-

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[1] See the government's Petition for a Writ of Certiorari, at p. 15 n. 7.

[2] The Commission has also asked interested persons to comment on whether there should be a right of access to normal programming time "and any other matters that they believe pertinent" (App. A, *infra*, p. 9).

dates for federal elective office. Section 103(a)(2)(A) of the Reform Act amends Section 312(a) of the Communications Act (47 U.S.C. 312(a)) to read as follows:

> The Commission may revoke any station license or construction permit—
>
> > (7) for willful or repeated failure to allow reasonable access to or permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

Section 103(a)(2)(B) of the new statute amends Section 315(a) of the Communications Act (47 U.S.C. 315(a)) by adding the three italicized words to the following language:

> No obligation is imposed *under this subsection* upon any licensee to allow the use of its station by any [political] candidate [emphasis added].

These amendments are, we submit, consistent with the view set forth in our petition for a writ of certiorari that determination of public interest requirements for the presentation of issues of public importance within the inherent limitations of the broadcast spectrum is a practical task peculiarly suited to resolution by Congress or by the Commission.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHN E. PETTIT,
General Counsel,
Federal Communications Commission.

FEBRUARY 1972.

APPENDIX A

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

Docket No. 19260

In the Matter of

The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act,

and

Guidelines for the Acceptance by Broadcast Licensees of Editorial Advertising

FURTHER NOTICE OF INQUIRY

Adopted:

February 3, 1972; Released: February 7, 1972

By the Commission:

Commissioner Johnson concurring and issuing a statement; Commissioner H. Rex Lee absent.

1. This Further Notice concerns Part IV of our Notice of June 9, 1971, including particularly the formulation of guidelines for the acceptance by broadcasters of editorial advertising. This latter facet is both the issue involved in *Business Executives' Move for Vietnam Peace* v. *F. C. C.*, — U.S. App. D.C. —, 450 F. 2d 642 (1971), and also an important aspect of the Part IV Inquiry—"access generally to the broadcast media for the discussion of public issues." We have delayed comment on Part IV because, as

discussed below, we are seeking further review of the above decision. However, the discussion makes clear that we must now move immediately to the consideration of guidelines in the area of editorial advertising. That being so, there is no reason to delay the filing of Part IV comments. Indeed, it would be helpful to have such comments before us when we consider the other issues in this Inquiry, since the issues are all inter-related to some degree. That does not mean that we shall decide all the issues at the same time. Circumstances appear to require more expeditious resolution of some aspects of the Inquiry than others. This Notice deals with one such area.

I

2. In *Business Executives' Move for Vietnam Peace* v. *F. C. C., supra,* the United States Court of Appeals for the District of Columbia Circuit held that a broadcast licensee may not, as a general policy, refuse to sell advertising time to groups or individuals wishing to speak on controversial public issues. While the Court left "undisturbed the licensee's basic right to exercise judgment and control in public issue programming" and "normal programming time," and it stated that no particular person or group has an absolute right to have his (or its) message carried, it ruled that in the broadcaster's allocation of advertising time it is not permissible to maintain a "total, flat ban on editorial advertising." The Court stated that

> "We hold specifically that a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted. We do not hold, however, that the planned announcements

> of the petitioners or, for that matter, of any other particular applicant for air time must necessarily be accepted by broadcast licensees. Rather we confine ourselves to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many 'editorial advertisements' will be put on the air."

3. On January 3, 1972 a petition for a writ of certiorari was filed on behalf of the Commission in the Supreme Court of the United States. No. 71-864, 40 U.S.L.W. 3317 (January 11, 1972). The Supreme Court has not yet acted on this petition. However, on January 24, 1972, the Court denied an application for a stay of mandate. Accordingly, the Commission is under a mandate to carry out the decision of the Court of Appeals which instructed the Commission as follows:

> "On remand, the Commission should develop reasonable regulatory guidelines to deal with editorial advertisements. Petitioners should be allowed to reapply for advertising time; and, unless their presentations are found to be excludable under the Commission's guidelines, their applications should be accepted. Since the issues on which BEM and DNC seek to speak are current and changing, it is essential that regulations be developed speedily and that the affected broadcasters pass promptly upon petitioners' applications to buy time."

4. The purpose of this Notice is to solicit the views of all interested parties on the nature and content of appropriate procedures and guidelines to be adopted

by the Commission in furtherance of the Court's mandate. We welcome all comments which can be of assistance in developing reasonable guidelines governing the determination by licensees of which and how many editorial advertisements will be put on the air. As a general approach, suggested guidelines or procedures should so far as possible be designed to avoid frequent recourse to individual requests for Commission rulings in particular situations. In particular, we urge parties filing comments to address the following areas:

a. May a licensee limit the time available for editorial advertisements and, if so, on what basis?

b. What regulation may the licensee make as to the placement of editorial advertisements?

c. May a licensee prevent domination by a few groups or a few viewpoints and, if so, by what means?

d. May a licensee reject a proferred advertisement on the ground that the particular viewpoint has been sufficiently expressed, short of finding undue dominance?

e. May a licensee reject a proferred advertisement on standards of taste and suitability for access to the home?

f. May a licensee reject a proffered advertisement on the ground that its subject matter is of little or no significance or interest to the community?

g. Are any restrictions on content permissible short of a finding that the material is outside the protection of the First Amendment?

h. Should the Commission's Cullman doctrine[1] be applicable to editorial and controversial issue advertisements which the licensee would not have aired in the first place except for the required sale of editorial advertising time?

i. What is the relationship generally of editorial advertising to the licensee's responsibilities under the fairness doctrine to make available a reasonable opportunity for the presentation of conflicting views on controversial issues of public importance? In this connection consideration should be given to the decision of the Supreme Court in *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367 (1969).

5. We are issuing this Further Notice of Inquiry rather than issuing guidelines without calling for comments because we believe that we need the views of those who would be confronted with the day-to-day practicalities of applying the guidelines. We are allowing a reasonable time for the submission of comments commensurate with the importance of the issues. However, prompt Commission action is required, and we intend to expedite our consideration of this matter. No extensions of time for comments are contemplated.

II

6. The discussion in I has dealt with access for editorial advertising. The other aspect of the Inquiry in Part IV is the matter of the right of access to programming time. We have set forth our view that

[1] See Cullman Broadcasting Co., 40 F.C.C. 576 (1963), which held that a licensee cannot avoid his fairness responsibilities simply because of his inability to obtain sponsorship for the presentation of a viewpoint.

the ruling in *Business Executives' Move for Vietnam Peace* v. *F.C.C.*, *supra*, does not extend to programming time. See *Committee of One Million*, October 22, 1971, FCC 71-1096. We have also set forth in Part IV issues which would be generally pertinent here (see para. 19, Notice of Inquiry of June 9, 1971). We shall not repeat that discussion here. Parties are invited to comment on those issues and any other matters that they believe pertinent.

III

7. Accordingly, pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules and Regulations, 47 CFR 1.415 (1972), interested parties may file comments on or before March 8, 1972, and reply comments on or before March 23, 1972, a schedule to which we intend to adhere (see para. 5, *supra*). In accordance with the provisions of Section 1.419 of the Rules, 47 CFR 1.419 (1972), an original and 14 copies of all comments and replies shall be furnished the Commission. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

8. Because of the importance of the matters in this Docket, we believe that some form of oral presentations will be helpful. If it is determined to have such presentations cover the issues in Part I of this Further Notice, we shall make this the first order of business at the oral proceedings and shall schedule such proceedings promptly after receipt of the reply comments. Finally, the authority for this Further

Notice is that stated in para. 24 of the Notice of Inquiry, June 9, 1971.

FEDERAL COMMUNICATIONS COMMISSION *

BEN F. WAPLE
Secretary

BEM Notice of Inquiry

[Notice of Inquiry on guidelines governing the purchase of time for editorial advertising in response to the mandate of the Court of Appeals in *Business Executives' Move for Vietnam Peace* v. *F.C.C.*, 450 F.2d 642 (D.C. Cir. 1971)]

Concurring Opinion of Commissioner Nicholas Johnson

I concur in the Commission's decision to put out a Notice of Inquiry as to what regulations or guidelines the FCC should promulgate regarding the purchase of airtime for "editorial advertisements." Certainly a decision of this magnitude should not be made without some opportunity for comment from broadcasters and citizens alike.

I. The Questions

The Commission poses nine questions to which it asks interested parties to address themselves. Since the comments of interested parties need not be limited to the particular questions posed by the Commission, I shall not object by way of dissent to any of the

* See attached statement of Commissioner Johnson.

particular questions. However, I do question the wisdom of some of these questions, for I believe that it would be unconstitutional for the Commission to answer them in the affirmative.

In discussing the limitations that may be placed on the purchase of advertising time in *BEM* the Court stated:

> The content of the idea which the excluded speakers seek to promote is—emphatically—*not* permitted as a distinguishing factor in itself. Indeed, the existence of an exclusionary discrimination apparently based on the content of ideas presents an additional, or greatly heightened, *prima facie* constitutional violation. Both free speech and equal protection principles condemn any discrimination among speakers which is based on what they intend to say. If the First Amendment prohibits anything at all, it must be a censorial discrimination among ideas. (Emphasis in original.)[1]

And the Court went on to say:

> It is well established in First Amendment law governing access to forums that "reasonable regulations" may be promulgated and enforced to limit the exercise of free speech. At the least, there may be regulations determining the time, place and manner of speech.[2]

Then the Court proceeded to state a few of the possible "traffic" regulations that may be promulgated by the Commission: a limit on the total amount of

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[1] *Business Executives' Move for Vietnam Peace* v. *F.C.C.*, 450 F. 2d 642, 660 (D.C. Cir. 1971).

[2] *Id.*, 663.

editorial advertisement time available; limitations on the right of placement in the time period of the advertiser's choice; a limit on the amount of time available to a particular group or adherents of a particular viewpoint; limitations on the amount of free time available to those unable to pay.[3]

Some of the questions posed may raise constitutional objections:

> (e) May a licensee reject a proffered advertisement on standards of taste and suitability for access to the home?
>
> (f) May a licensee reject a proffered advertisement on the ground that its subject matter is of little or no significance or interest to the community?

Affirmative answers to these two questions would transcend the "time, place and manner" limitations which the Court authorized the Commission to enact.

The only reason I concur and do not dissent to this Notice of Inquiry is that the mere posing of these questions does not bind the Commission to adopting an affirmative answer to these questions. Moreover, interested citizens and broadcasters should have the opportunity to comment on the whole range of questions raised by the *BEM* decision, and I would like to have the benefit of those comments.

II. Interim Procedures

The question remains, what do we do in the meantime? What is our proper response to those petitions which might be filed between now and the promulgation of our regulations? *BEM* is now the law of the land. This is implicit in the fact that the Commission

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[3] *Id.*, 663-665.

now asks for comments and prepares to issue guidelines, even before the United States Supreme Court acts on the pending petition for *certiorari*. This is so, of course, because after the decision of the Court of Appeals some six months ago (August 3, 1971), the Commission's petition for rehearing was denied by the Court (October 4, 1971), our motion for a stay of mandate was denied by the Court (October 22, 1971), and our motion for a stay of mandate was denied by the Supreme Court (January 24, 1972).

Since *BEM* is now the law of the land, we must rule on whatever petitions that are filed according to the law of *BEM:* there can be no flat ban on "editorial advertisements." I have absolutely no idea whether any such petitions are going to be filed in the next 45 days or so. But it is clear that if any are filed, it will not be appropriate for the Commission to act as it did last August 6, in the *Communications Workers of America* case.[4] On the day after the *BEM* decision, CWA was turned down by NBC and CBS owned-and-operated stations in their request to buy time for "editorial advertisements." In that opinion, to which I dissented, the Commission stated that it had not yet had time to promulgate the regulations suggested by the Court of Appeals. The same excuse is not open to the Commission now. In the six months since *BEM*, even while appealing the *BEM* case to the Supreme Court, the Commission surely could have adopted regulations to go into effect whenever the *BEM* case became the law of the land.

Now we are faced with that very situation. *BEM* is the law, and there are no regulations. How should we act?

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[4] *Communications Workers of America*, Request for Declaratory Ruling, 31 F.C.C.2d 841 (1971).

BEM said that it was unconstitutional for a licensee to enact a flat ban on editorial advertising. The Court's opinion shows that the presumption clearly has to be in favor of the petitioner, not the licensee, in such a dispute:

> It being established that there is a strong and specific First Amendment interest in editorial advertising and that the policies discriminatorily barring such expression work a *prima facie* violation of constitutional principles, we must consider the countervailing considerations raised by the Commission and the broadcaster-intervenors. In order to justify the policy at issue, they must show some very substantial harm that would be caused by acceptance of editorial advertising—a sort of harm great enough to override the First Amendment interests at stake and a sort of harm not already involved in the acceptance of commercial and "noncontroversial" advertising. Only such a showing could convince us that the ban on editorial advertisements is supported by sufficient countervailing values and is not based solely on the content of the ideas conveyed.[5]

Thus, in the absence of any regulations, the burden is on the *broadcaster*, not the citizen. The broadcaster must explain to the FCC why he cannot accept the citizen's money and put the editorial advertisement on the air: he must make a showing of "some very substantial harm that would be caused by acceptance of editorial advertising."

Since the Court of Appeals went out of its way to state that "[s]ince the issues on which BEM and DNC seek to speak are current and changing, it is essential that regulations be developed speedily and

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[5] *B.E.M.* v. *F.C.C.*, *supra* at 662.

that the affected broadcasters pass promptly upon petitioners' applications to buy time," [6] I do not think that this Commission has any alternative but to issue an interim rule, pending the outcome of this Notice of Inquiry, that all requests for the purchase of time for editorial advertisements must be accepted by the broadcasters, absent showing of "some very substantial harm."

I do not honestly know what this Commission is prepared to do if, in fact, such a petition is filed between now and the time the regulations are promulgated. As with any matter of free speech, time is of the essence. Certainly this is the cardinal principle underlying the Supreme Court's decision in *The New York Times Co.* v. *U.S.*, 403 U.S. 713 (1971), where the Supreme Court once again affirmed the age-old presumption against any form of prior restraint. Inasmuch as the Commission affords no guidance on this issue whatsoever, I simply must assume that the Commission intended by its silence on the issue to adopt the interim rule of law implicit in the Court's opinion in *BEM:* absent a showing of "some very substantial harm that would be caused by acceptance of editorial advertising," the broadcaster is required by the First Amendment to accept the request for paid access for the airing of editorial advertising.[7]

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[6] *Id.*, 665.

[7] I do not consider it necessary to discuss in detail what sort of showing would be appropriate under the "very substantial harm" test. I must state that I find it hard to believe that the placement of a few editorial advertisements into any broadcaster's schedule—accompanied, of course, by good money—would do anything but enrich the broadcaster. I know of few cases in which broadcasters have been unable to find the airtime to squeeze just one more spot on the air,

Accordingly, I concur.

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especially when the order is accompanied by payment. Is that not the hallmark of our commercial broadcasting system?

On the other hand, there is the question as to effect of editorial advertising on the broadcaster's fairness obligations. For the purposes of argument, I shall pose three distinct examples in order to assess this question.

The first case is that of a citizen who seeks to buy time for an issue that everyone agrees is not controversial and thus not subject to the Fairness Doctrine. These spots are by definition non-controversial and should go on the air without question, since they do not give rise to the obligation to present the other side of a controversial issue, and thus no revenue loss to the broadcaster can result under *Cullman*. 40 F.C.C. 576 (1963).

The second situation is if the issue being discussed by the editorial spots has already been heavily covered by the broadcaster, and the coverage has already been adequately balanced. Such an instance might be Vietnam, the subject of BEM's spots. No *Cullman* problems would arise since it is unlikely that any overall imbalance would result from the acceptance of a few more minutes of time for or against the war.

The third situation is that in which a controversial issue not previously covered by the broadcaster is discussed in the spots. Here, the inclusion of airtime on one side of the controversy will not create any obligations that do not already exist on the part of the broadcaster: He always has had the obligation under the Fairness Doctrine to cover the controversy at his own expense. Thus, he cannot really object to the particular form (editorial spots) in which the controversy has first been broached on his station—especially when it was produced at no cost to him.

APPENDIX B

AN ACT

To promote fair practices in the conduct of election campaigns for Federal political offices, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Election Campaign Act of 1971".

TITLE I—CAMPAIGN COMMUNICATIONS

SHORT TITLE

SEC. 101. This title may be cited as the "Campaign Communications Reform Act".

DEFINITIONS

SEC. 102. For purposes of this title:

(1) The term "communications media" means broadcasting stations, newspapers, magazines, outdoor advertising facilities, and telephones; but, with respect to telephones, spending or an expenditure shall be deemed to be spending or an expenditure for the use of communications media only if such spending or expenditure is for the costs of telephones, paid telephonists, and automatic telephone equipment, used by a candidate for Federal elective office to communicate with potential voters (excluding any costs of telephones incurred by a volunteer for use of telephones by him).

(2) The term "broadcasting station" has the same meaning as such term has under section 315(f) of the Communications Act of 1934.

(3) The term "Federal elective office" means the office of President of the United States, or of Senator or Representative in, or Resident Commissioner or Delegate to, the Congress of the United States (and for purposes of section 103(b) such term includes the office of Vice President).

(4) The term "legally qualified candidate" means any person who (A) meets the qualifications prescribed by the applicable laws to hold the Federal elective office for which he is a candidate, and (B) is eligible under applicable State law to be voted for by the electorate directly or by means of delegates or electors.

(5) The term "voting age population" means resident population, eighteen years of age and older.

(6) The term "State" includes the District of Columbia and the Commonwealth of Puerto Rico.

MEDIA RATE AND RELATED REQUIREMENTS

SEC. 103. (a)(1) Section 315(b) of the Communications Act of 1934 is amended to read as follows:

"(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed—

"(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person

is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

"(2) at any other time, the charges made for comparable use of such station by other users thereof."

(2)(A) Section 312(a) of such Act is amended by striking "or" at the end of clause (5), striking the period at the end of clause (6) and inserting in lieu thereof a semicolon and "or", and adding at the end of such section 312(a) the following new paragraph:

"(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."

(B) The second sentence of section 315(a) of such Act is amended by inserting "under this subsection" after "No obligation is imposed".

(b) To the extent that any person sells space in any newspaper or magazine to a legally qualified candidate for Federal elective office, or nomination thereto, in connection with such candidate's campaign for nomination for, or election to, such office, the charges made for the use of such space in connection with his campaign shall not exceed the charges made for comparable use of such space for other purposes.

LIMITATIONS OF EXPENDITURES FOR USE OF COMMUNICATIONS MEDIA

SEC. 104. (a)(1) Subject to paragraph (4), no legally qualified candidate in an election (other than a primary or primary runoff election) for a Federal elective office may—

(A) spend for the use of communications media on behalf of his candidacy in such election a total amount in excess of the greater of—

(i) 10 cents multiplied by the voting age population (as certified under paragraph (5)) of the geographical area in which the election for such office is held, or

(ii) $50,000, or

(B) spend for the use of broadcast stations on behalf of his candidacy in such election a total amount in excess of 60 per centum of the amount determined under subparagraph (A) with respect to such election.

(2) No legally qualified candidate in a primary election for nomination to a Federal elective office, other than President, may spend—

(A) for the use of communications media, or

(B) for the use of broadcast stations,

on behalf of his candidacy in such election a total amount in excess of the amounts determined under paragraph (1) (A) or (B), respectively, with respect to the general election for such office. For purposes of this subsection a primary runoff election shall be treated as a separate primary election.

(3)(A) No person who is a candidate for presidential nomination may spend—

(i) for the use in a State of communications media, or

(ii) for the use in a State of broadcast stations,

on behalf of his candidacy for presidential nomination a total amount in excess of the amounts which

would have been determined under paragraph (1) (A) or (B), respectively, had he been a candidate for election for the office of Senator from such State (or for the office of Delegate or Resident Commissioner in the case of the District of Columbia or the Commonwealth of Puerto Rico).

(B) For purposes of this paragraph (3), a person is a candidate for presidential nomination if he makes (or any other person makes on his behalf) an expenditure for the use of any communications medium on behalf of his candidacy for any political party's nomination for election to the office of President. He shall be considered to be such a candidate during the period—

(i) beginning on the date on which he (or such other person) first makes such an expenditure (or, if later, January 1 of the year in which the election for the office of President is held), and

(ii) ending on the date on which such political party nominates a candidate for the office of President.

For purposes of this title and of section 315 of the Communications Act of 1934, a candidate for presidential nomination shall be considered a legally qualified candidate for public office.

(C) The Comptroller General shall prescribe regulations under which any expenditure by a candidate for presidential nomination for the use in two or more States of a communications medium shall be attributed to such candidate's expenditure limitation in each such State, based on the number of persons in such State who can reasonably be expected to be reached by such communications medium.

(4)(A) For purposes of subparagraph (B):

(i) The term "price index" means the average over a calendar year of the Consumer Price Index (all items—United States city average) published monthly by the Bureau of Labor Statistics.

(ii) The term "base period" means the calendar year 1970.

(B) At the beginning of each calendar year (commencing in 1972), as there becomes available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Comptroller General and publish in the Federal Register the per centum difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period. Each amount determined under paragraph (1)(A)(i) and (ii) shall be increased by such per centum difference. Each amount so increased shall be the amount in effect for such calendar year.

(5) Within 60 days after the date of enactment of this Act, and during the first week of January in 1973 and every subsequent year, the Secretary of Commerce shall certify to the Comptroller General and publish in the Federal Register an estimate of the voting age population of each State and congressional district for the last calendar year ending before the date of certification.

(6) Amounts spent for the use of communications media on behalf of any legally qualified candidate for Federal elective office (or for nomination to such office) shall, for the purposes of this subsection, be deemed to have been spent by such candidate. Amounts spent for the use of communications media by or on behalf of any legally qualified candidate for the office of Vice President of the United States

shall, for the purposes of this section, be deemed to have been spent by the candidate for the office of President of the United States with whom he is running.

(7) For purposes of this section and section 315 (c) of the Communications Act of 1934—

(A) spending and charges for the use of communications media include not only the direct charges of the media but also agents' commissions allowed the agent by the media, and

(B) any expenditure for the use of any communications medium by or on behalf of the candidacy of a candidate for Federal elective office (or nomination thereto) shall be charged against the expenditure limitation under this subsection applicable to the election in which such medium is used.

(b) No person may make any charge for the use by or on behalf of any legally qualified candidate for Federal elective office (or for nomination to such office) of any newspaper, magazine, or outdoor advertising facility, unless such candidate (or a person specifically authorized by such candidate in writing to do so) certifies in writing to the person making such charge that the payment of such charge will not violate paragraph (1), (2), or (3) of subsection (a), whichever is applicable.

(c) Section 315 of the Communications Act of 1934 is amended by redesignating subsection (c) as subsection (g) and by inserting after subsection (b) the following new subsections:

"(c) No station licensee may make any charge for the use of such station by or on behalf of any legally qualified candidate for Federal elective office

(or for nomination to such office) unless such candidate (or a person specifically authorized by such candidate in writing to do so) certifies to such licensee in writing that the payment of such charge will not violate any limitation specified in paragraph (1), (2), or (3) of section 104(a) of the Campaign Communications Reform Act, whichever paragraph is applicable.

"(d) If a State by law and expressly—

"(1) has provided that a primary or other election for any office of such State or of a political subdivision thereof is subject to this subsection,

"(2) has specified a limitation upon total expenditures for the use of broadcasting stations on behalf of the candidacy of each legally qualified candidate in such election,

"(3) has provided in any such law an unequivocal expression of intent to be bound by the provisions of this subsection, and

"(4) has stipulated that the amount of such limitation shall not exceed the amount which would be determined for such election under section 104(a)(1)(B) or 104(a)(2)(B) (whichever is applicable) of the Campaign Communications Reform Act had such election been an election for a Federal elective office or nomination thereto;

then no station licensee may make any charge for the use of such station by or on behalf of any legally qualified candidate in such election unless such candidate (or a person specifically authorized by such candidate in writing to do so) certifies to such licensee in writing that the payment of such charge will not violate such State limitation.

"(e) Whoever willfully and knowingly violates the provisions of subsection (c) or (d) of this section shall be punished by a fine not to exceed $5,000 or imprisonment for a period not to exceed five years, or both. The provisions of sections 501 through 503 of this Act shall not apply to violations of either such subsection.

"(f)(1) For the purposes of this section:

"(A) The term 'broadcasting station' includes a community antenna television system.

"(B) The terms 'licensee' and 'station licensee' when used with respect to a community antenna television system, means the operator of such system.

"(C) The term 'Federal elective office' means the office of President of the United States, or of Senator or Representative in, or Resident Commissioner or Delegate to, the Congress of the United States.

"(2) For purposes of subsections (c) and (d), the term 'legally qualified candidate' means any person who (A) meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate and (B) is eligible under applicable State law to be voted for by the electorate directly or by means of delegates or electors."

REGULATIONS

SEC. 105. The Comptroller General shall prescribe such regulations as may be necessary or appropriate to carry out sections 102, 103(b), 104(a), and 104(b) of this Act.

PENALTIES

SEC. 106. Whoever willfully and knowingly violates any provision of section 103(b), 104(a), or 104 (b) or any regulation under section 105 shall be punished by a fine of not more than $5,000 or by imprisonment of not more than five years, or both.

TITLE II—CRIMINAL CODE AMENDMENTS

SEC. 201. Section 591 of title 18, United States Code, is amended to read as follows:

§ 591. Definitions

"When used in sections 597, 599, 600, 602, 608, 610, and 611 of this title—

"(a) 'election' means (1) a general, special, primary, or runoff election, (2) a convention or caucus of a political party held to nominate a candidate, (3) a primary election held for the selection of delegates to a national nominating convention of a political party, (4) a primary election held for the expression of a preference for the nomination of persons for election to the office of President, and (5) the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

"(b) 'candidate' means an individual who seeks nomination for election, or election, to Federal office, whether or not such individual is elected, and, for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election, to Federal office, if he has (1) taken the action necessary under the law of a State to qualify himself for nomination for election, or election, or (2) received contri-

butions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election, to such office;

"(c) 'Federal office' means the office of President or Vice President of the United States, or Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States;

"(d) 'political committee' means any individual, committee, association, or organization which accepts contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000;

"(e) 'contribution' means—

"(1) a gift, subscription, loan, advance, or deposit of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business), made for the purpose of influencing the nomination for election, or election, of any person to Federal office, for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

"(2) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for such purposes;

"(3) a transfer of funds between political committees;

"(4) the payment, by any person other than a candidate or political committee, of compensation for the personal services of another person which are rendered to such candidate or political committee without charge for any such purpose; and

"(5) notwithstanding the foregoing meanings of 'contribution', the word shall not be construed to include services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate or political committee;

"(f) 'expenditure' means—

"(1) a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business), made for the purpose of influencing the nomination for election, or election, of any person to Federal office, for the purpose of influencing the result of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of dele-

gates to a constitutional convention for proposing amendments to the Constitution of the United States;

"(2) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure; and

"(3) a transfer of funds between political committees;

"(g) 'person' and 'whoever' mean an individual, partnership, committee, association, corporation, or any other organization or group of persons; and

"(h) 'State' means each State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.".

SEC. 202. Section 600 of title 18, United States Code, is amended to read as follows:

"§ 600. Promise of employment or other benefit for political activity

"Whoever, directly or indirectly, promises any employment, position, compensation, contract, appointment, or other benefit, provided for or made possible in whole or in part by any Act of Congress, or any special consideration in obtaining any such benefit, to any person as consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party in connection with any general or special election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, shall be fined not more than $1,000 or imprisoned not more than one year, or both.".

SEC. 203. Section 608 of title 18, United States Code, is amended to read as follows:

"§ 608. Limitations on contributions and expenditures

"(a)(1) No candidate may make expenditures from his personal funds, or the personal funds of his immediate family, in connection with his campaign for nomination for election, or election, to Federal office in excess of—

"(A) $50,000, in the case of a candidate for the office of President or Vice President;

"(B) $35,000, in the case of a candidate for the office of Senator; or

"(C) $25,000, in the case of a candidate for the office of Representative, or Delegate or Resident Commissioner to the Congress.

"(2) For purposes of this subsection, 'immediate family' means a candidate's spouse, and any child, parent, grandparent, brother, or sister of the candidate, and the spouses of such persons.

"(b) No candidate or political committee shall knowingly accept any contribution or authorize any expenditure in violation of the provisions of this section.

"(c) Violation of the provisions of this section is punishable by a fine not to exceed $1,000, imprisonment for not to exceed one year, or both.".

SEC. 204. Section 609 of title 18, United States Code, is repealed.

SEC. 205. Section 610 of title 18, United States Code, relating to contributions or expenditures by national banks, corporations, or labor organizations, is amended by adding at the end thereof the following paragraph:

"As used in this section, the phrase 'contribution or expenditure' shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization: *Provided*, That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction.".

SEC. 206. Section 611 of title 18, United States Code, is amended to read as follows:

"§ 611. Contributions by Government contractors

"Whoever—

"(a) entering into any contract with the United States or any department or agency

thereof either for the rendition of personal services or furnishing any material, supplies, or equipment to the United States or any department or agency thereof or for selling any land or building to the United States or any department or agency thereof, if payment for the performance of such contract or payment for such material, supplies, equipment, land, or building is to be made in whole or in part from funds appropriated by the Congress, at any time between the commencement of negotiations for and the later of (1) the completion of performance under, or (2) the termination of negotiations for, such contract or furnishing of material, supplies, equipment, land or buildings, directly or indirectly makes any contribution of money or other thing of value, or promises expressly or impliedly to make any such contribution, to any political party, committee, or candidate for public office or to any person for any political purpose or use; or

"(b) knowingly solicits any such contribution from any such person for any such purpose during any such period;

shall be fined not more than $5,000 or imprisoned not more than five years, or both.".

SEC. 207. The table of sections for chapter 29 of title 18, United States Code, is amended by—

(1) striking out the item relating to section 608 and inserting in lieu thereof the following:

"608. Limitations on contributions and expenditures.";

(2) striking out the item relating to section 609 and inserting in lieu thereof the following:

"609. Repealed.";

(3) striking out the item relating to section 611 and inserting in lieu thereof the following:

"611. Contributions by Government contractors.".

TITLE III—DISCLOSURE OF FEDERAL CAMPAIGN FUNDS

DEFINITIONS

SEC. 301. When used in this title—

(a) "election" means (1) a general, special, primary, or runoff election, (2) a convention or caucus of a political party held to nominate a candidate, (3) a primary election held for the selection of delegates to a national nominating convention of a political party, (4) a primary election held for the expression of a preference for the nomination of persons for election to the office of President, and (5) the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

(b) "candidate" means an individual who seeks nomination for election, or election, to Federal office, whether or not such individual is elected, and, for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election, if he has (1) taken the action necessary under the law of a State to qualify himself for nomination for election, or election, to Federal office, or (2) received contributions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election, to such office;

(c) "Federal office" means the office of President or Vice President of the United States; or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States;

(d) "political committee" means any committee, association, or organization which accepts contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000;

(e) "contribution" means—

(1) a gift, subscription, loan, advance, or deposit of money or anything of value, made for the purpose of influencing the nomination for election, or election, of any person to Federal office or as a presidential or vice-presidential elector, or for the purpose of influencing the result of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

(2) a contract, promise, or agreement, whether or not legally enforceable, to make a contribution for any such purpose;

(3) a transfer of funds between political committees;

(4) the payment, by any person other than a candidate or political committee, of compensation for the personal services of another person which are rendered to such can-

didate or committee without charge for any such purpose; and

(5) notwithstanding the foregoing meanings of "contribution", the word shall not be construed to include services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate or political committee;

(f) "expenditure" means—

(1) a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made for the purpose of influencing the nomination for election, or election, of any person to Federal office, or as a presidential and vice-presidential elector, or for the purpose of influencing the result of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

(2) a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure, and

(3) a transfer of funds between political committees;

(g) "supervisory officer" means the Secretary of the Senate with respect to candidates for Senator; the Clerk of the House of Representatives with respect to candidates for Representative in, or Delegate or Resident Commissioner to, the

Congress of the United States; and the Comptroller General of the United States in any other case;

(h) "person" means an individual, partnership, committee, association, corporation, labor organization, and any other organization or group of persons; and

(i) "State" means each State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

ORGANIZATION OF POLITICAL COMMITTEES

SEC. 302. (a) Every political committee shall have a chairman and a treasurer. No contribution and no expenditure shall be accepted or made by or on behalf of a political committee at a time when there is a vacancy in the office of chairman or treasurer thereof. No expenditure shall be made for or on behalf of a political committee without the authorization of its chairman or treasurer, or their designated agents.

(b) Every person who receives a contribution in excess of $10 for a political committee shall, on demand of the treasurer, and in any event within five days after receipt of such contribution, render to the treasurer a detailed account thereof, including the amount, the name and address (occupation and the principal place of business, if any) of the person making such contribution, and the date on which received. All funds of a political committee shall be segregated from, and may not be commingled with, any personal funds of officers, members, or associates of such committee.

(c) It shall be the duty of the treasurer of a political committee to keep a detailed and exact account of—

(1) all contributions made to or for such committee;

(2) the full name and mailing address (occupation and the principal place of business, if any) of every person making a contribution in excess of $10, and the date and amount thereof;

(3) all expenditures made by or on behalf of such committee; and

(4) the full name and mailing address (occupation and the principal place of business, if any) of every person to whom any expenditure is made, the date and amount thereof and the name and address of, and office sought by, each candidate on whose behalf such expenditure was made.

(d) It shall be the duty of the treasurer to obtain and keep a receipted bill, stating the particulars, for every expenditure made by or on behalf of a political committee in excess of $100 in amount, and for any such expenditure in a lesser amount, if the aggregate amount of such expenditures to the same person during a calendar year exceeds $100. The treasurer shall preserve all receipted bills and accounts required to be kept by this section for periods of time to be determined by the supervisory officer.

(e) Any political committee which solicits or receives contributions or makes expenditures on behalf of any candidate that is not authorized in writing by such candidate to do so shall include a notice on the face or front page of all literature and advertisements published in connection with such candidate's campaign by such committee or on its behalf stating that the committee is not authorized by such candidate and that such candidate is not responsible for the activities of such committee.

(f) (1) Any political committee shall include on the

face or front page of all literature and advertisements soliciting funds the following notice:

"A copy of our report filed with the appropriate supervisory officer is (or will be) available for purchase from the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402.".

(2)(A) The supervisory officer shall compile and furnish to the Public Printer, not later than the last day of March of each year, an annual report for each political committee which has filed a report with him under this title during the period from March 10 of the preceding calendar year through January 31 of the year in which such annual report is made available to the Public Printer. Each such annual report shall contain—

(i) a copy of the statement of organization of the political committee required under section 303, together with any amendments thereto; and

(ii) a copy of each report filed by such committee under section 304 from March 10 of the preceding year through January 31 of the year in which the annual report is so furnished to the Public Printer.

(B) The Public Printer shall make copies of such annual reports available for sale to the public by the Superintendent of Documents as soon as practicable after they are received from the supervisory officer.

REGISTRATION OF POLITICAL COMMITTEES; STATEMENTS

SEC. 303. (a) Each political committee which anticipates receiving contributions or making expenditures during the calendar year in an aggregate

amount exceeding $1,000 shall file with the supervisory officer a statement of organization, within ten days after its organization or, if later, ten days after the date on which it has information which causes the committee to anticipate it will receive contributions or make expenditures in excess of $1,000. Each such committee in existence at the date of enactment of this Act shall file a statement of organization with the supervisory officer at such time as he prescribes.

(b) The statement of organization shall include—

(1) the name and address of the committee;

(2) the names, addresses, and relationships of affiliated or connected organizations;

(3) the area, scope, or jurisdiction of the committee;

(4) the name, address, and position of the custodian of books and accounts;

(5) the name, address, and position of other principal officers, including officers and members of the finance committee, if any;

(6) the name, address, office sought, and party affiliation of (A) each candidate whom the committee is supporting, and (B) any other individual, if any, whom the committee is supporting for nomination for election, or election, to any public office whatever; or, if the committee is supporting the entire ticket of any party, the name of the party;

(7) a statement whether the committee is a continuing one;

(8) the disposition of residual funds which will be made in the event of dissolution;

(9) a listing of all banks, safety deposit boxes, or other repositories used;

(10) a statement of the reports required to be filed by the committee with State or local officers,

and, if so, the names, addresses, and positions of such persons; and

(11) such other information as shall be required by the supervisory officer.

(c) Any change in information previously submitted in a statement of organization shall be reported to the supervisory officer within a ten-day period following the change.

(d) Any committee which, after having filed one or more statements of organization, disbands or determines it will no longer receive contributions or make expenditures during the calendar year in an aggregate amount exceeding $1,000 shall so notify the supervisory officer.

REPORTS BY POLITICAL COMMITTEES AND CANDIDATES

SEC. 304. (a) Each treasurer of a political committee supporting a candidate or candidates for election to Federal office, and each candidate for election to such office, shall file with the appropriate supervisory officer reports of receipts and expenditures on forms to be prescribed or approved by him. Such reports shall be filed on the tenth day of March, June, and September, in each year, and on the fifteenth and fifth days next preceding the date on which an election is held, and also by the thirty-first day of January. Such reports shall be complete as of such date as the supervisory officer may prescribe, which shall not be less than five days before the date of filing, except that any contribution of $5,000 or more received after the last report is filed prior to the election shall be reported within forty-eight hours after its receipt.

(b) Each report under this section shall disclose—

(1) the amount of cash on hand at the beginning of the reporting period;

(2) the full name and mailing address (occupation and the principal place of business, if any) of each person who has made one or more contributions to or for such committee or candidate (including the purchase of tickets for events such as dinners, luncheons, rallies, and similar fundraising events) within the calendar year in an aggregate amount or value in excess of $100, together with the amount and date of such contributions;

(3) the total sum of individual contributions made to or for such committee or candidate during the reporting period and not reported under paragraph (2);

(4) the name and address of each political committee or candidate from which the reporting committee or the candidate received, or to which that committee or candidate made, any transfer of funds, together with the amounts and dates of all transfers;

(5) each loan to or from any person within the calendar year in an aggregate amount or value in excess of $100, together with the full names and mailing addresses (occupations and the principal places of business, if any) of the lender and endorsers, if any, and the date and amount of such loans;

(6) the total amount of proceeds from (A) the sale of tickets to each dinner, luncheon, rally, and other fundraising event; (B) mass collections made at such events; and (C) sales of items such as political campaign pins, buttons, badges, flags, emblems, hats, banners, literature, and similar materials;

(7) each contribution, rebate, refund, or other receipt in excess of $100 not otherwise listed under paragraphs (2) through (6);

(8) the total sum of all receipts by or for such committee or candidate during the reporting period;

(9) the full name and mailing address (occupation and the principal place of business, if any) of each person to whom expenditures have been made by such committee or on behalf of such committee or candidate within the calendar year in an aggregate amount or value in excess of $100, the amount, date, and purpose of each such expenditure and the name and address of, and office sought by, each candidate on whose behalf such expenditure was made;

(10) the full name and mailing address (occupation and the principal place of business, if any) of each person to whom an expenditure for personal services, salaries, and reimbursed expenses in excess of $100 has been made, and which is not otherwise reported, including the amount, date, and purpose of such expenditure;

(11) the total sum of expenditures made by such committee or candidate during the calendar year;

(12) the amount and nature of debts and obligations owed by or to the committee, in such form as the supervisory officer may prescribe and a continuous reporting of their debts and obligations after the election at such periods as the supervisory officer may require until such debts and obligations are extinguished; and

(13) such other information as shall be required by the supervisory officer.

(c) The reports required to be filed by subsection (a) shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous report during such year, only the amount need be carried forward. If no contributions or expenditures have been accepted or expended during a calendar year, the treasurer of the political committee or candidate shall file a statement to that effect.

REPORTS BY OTHERS THAN POLITICAL COMMITTEES

SEC. 305. Every person (other than a political committee or candidate) who makes contributions or expenditures, other than by contribution to a political committee or candidate, in an aggregate amount in excess of $100 within a calendar year shall file with the supervisory officer a statement containing the information required by section 304. Statements required by this section shall be filed on the dates on which reports by political committees are filed, but need not be cumulative.

FORMAL REQUIREMENTS RESPECTING REPORTS AND STATEMENTS

SEC. 306. (a) A report or statement required by this title to be filed by a treasurer of a political committee, a candidate, or by any other person, shall be verified by the oath or affirmation of the person filing such report or statement, taken before any officer authorized to administer oaths.

(b) A copy of a report or statement shall be preserved by the person filing it for a period of time to be designated by the supervisory officer in a published regulation.

(c) The supervisory officer may, by published regulation of general applicability, relieve any category of political committees of the obligation to comply with section 304 if such committee (1) primarily supports persons seeking State or local office, and does not substantially support candidates, and (2) does not operate in more than one State or on a statewide basis.

(d) The supervisory officer shall, by published regulations of general applicability, prescribe the manner in which contributions and expenditures in the nature of debts and other contracts, agreements, and promises to make contributions or expenditures shall be reported. Such regulations shall provide that they be reported in separate schedules. In determining aggregate amounts of contributions and expenditures, amounts reported as provided in such regulations shall not be considered until actual payment is made.

REPORTS ON CONVENTION FINANCING

SEC. 307. Each committee or other organization which—

(1) represents a State, or a political subdivision thereof, or any group of persons, in dealing with officials of a national political party with respect to matters involving a convention held in such State or political subdivision to nominate a candidate for the office of President or Vice President, or

(2) represents a national political party in making arrangements for the convention of such party held to nominate a candidate for the office of President or Vice President,

shall, within sixty days following the end of the convention (but not later than twenty days prior to the

date on which presidential and vice-presidential electors are chosen), file with the Comptroller General of the United States a full and complete financial statement, in such form and detail as he may prescribe, of the sources from which it derived its funds, and the purposes for which such funds were expended.

DUTIES OF THE SUPERVISORY OFFICER

SEC. 308. (a) It shall be the duty of the supervisory officer—

(1) to develop and furnish to the person required by the provisions of this Act prescribed forms for the making of the reports and statements required to be filed with him under this title;

(2) to prepare, publish, and furnish to the person required to file such reports and statements a manual setting forth recommended uniform methods of bookkeeping and reporting;

(3) to develop a filing, coding, and cross-indexing system consonant with the purposes of this title;

(4) to make the reports and statements filed with him available for public inspection and copying, commencing as soon as practicable but not later than the end of the second day following the day during which it was received, and to permit copying of any such report or statement by hand or by duplicating machine, as requested by any person, at the expense of such person: *Provided*, That any information copied from such reports and statements shall not be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose;

(5) to preserve such reports and statements for a period of ten years from date of receipt, except that reports and statements relating solely to candidates for the House of Representatives shall be preserved for only five years from the date of receipt;

(6) to compile and maintain a current list of all statements or parts of statements pertaining to each candidate;

(7) to prepare and publish an annual report including compilations of (A) total reported contributions and expenditures for all candidates, political committees, and other persons during the year; (B) total amounts expended according to such categories as he shall determine and broken down into candidate, party, and nonparty expenditures on the National, State, and local levels; (C) total amounts expended for influencing nominations and elections stated separately; (D) total amounts contributed according to such categories of amounts as he shall determine and broken down into contributions on the national, State, and local levels for candidates and political committees; and (E) aggregate amounts contributed by any contributor shown to have contributed in excess of $100;

(8) to prepare and publish from time to time special reports comparing the various totals and categories of contributions and expenditures made with respect to preceding elections;

(9) to prepare and publish such other reports as he may deem appropriate;

(10) to assure wide dissemination of statistics, summaries, and reports prepared under this title;

(11) to make from time to time audits and field investigations with respect to reports and statements filed under the provisions of this title, and with respect to alleged failures to file any report or statement required under the provisions of this title;

(12) to report apparent violations of law to the appropriate law enforcement authorities; and

(13) to prescribe suitable rules and regulations to carry out the provisions of this title.

(b) The supervisory officer shall encourage, and cooperate with, the election officials in the several States to develop procedures which will eliminate the necessity of multiple filings by permitting the filing of copies of Federal reports to satisfy the State requirements.

(c) It shall be the duty of the Comptroller General to serve as a national clearinghouse for information in respect to the administration of elections. In carrying out his duties under this subsection, the Comptroller General shall enter into contracts for the purpose of conducting independent studies of the administration of elections. Such studies shall include, but shall not be limited to, studies of—

(1) the method of selection of, and the type of duties assigned to, officials and personnel working on boards of elections;

(2) practices relating to the registration of voters; and

(3) voting and counting methods.

Studies made under this subsection shall be published by the Comptroller General and copies thereof shall be made available to the general public upon the payment of the cost thereof. Nothing in this subsection

shall be construed to authorize the Comptroller General to require the inclusion of any comment or recommendation of the Comptroller General in any such study.

(d)(1) Any person who believes a violation of this title has occurred may file a complaint with the supervisory officer. If the supervisory officer determines there is substantial reason to believe such a violation has occurred, he shall expeditiously make an investigation, which shall also include an investigation of reports and statements filed by the complainant if he is a candidate, of the matter complained of. Whenever in the judgment of the supervisory officer, after affording due notice and an opportunity for a hearing, any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this title or any regulation or order issued thereunder, the Attorney General on behalf of the United States shall institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the person is found, resides, or transacts business. Upon a proper showing that such person has engaged or is about to engage in such acts or practices, a permanent or temporary injunction, restraining order, or other order shall be granted without bond by such court.

(2) In any action brought under paragraph (1) of this subsection, subpenas for witnesses who are required to attend a United States district court may run into any other district.

(3) Any party aggrieved by an order granted under paragraph (1) of this subsection may, at any time within sixty days after the date of entry thereof, file a petition with the United States court of

appeals for the circuit in which such person is found, resides, or transacts business, for judicial review of such order.

(4) The judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(5) Any action brought under this subsection shall be advanced on the docket of the court in which filed, and put ahead of all other actions (other than other actions brought under this subsection).

STATEMENTS FILED WITH STATE OFFICERS

SEC. 309. (a) A copy of each statement required to be filed with a supervisory officer by this title shall be filed with the Secretary of State (or, if there is no office of Secretary of State, the equivalent State officer) of the appropriate State. For purposes of this subsection, the term "appropriate State" means—

(1) for reports relating to expenditures and contributions in connection with the campaign for nomination for election, or election, of a candidate to the office of President or Vice President of the United States, each State in which an expenditure is made by him or on his behalf, and

(2) for reports relating to expenditures and contributions in connection with the campaign for nomination for election, or election, of a candidate to the office of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States, the State in which he seeks election.

(b) It shall be the duty of the Secretary of State, or the equivalent State officer, under subsection (a)—

(1) to receive and maintain in an orderly manner all reports and statements required by this title to be filed with him;

(2) to preserve such reports and statements for a period of ten years from date of receipt, except that reports and statements relating solely to candidates for the House of Representatives shall be preserved for only five years from the date of receipt;

(3) to make the reports and statements filed with him available for public inspection and copying during regular office hours, commencing as soon as practicable but not later than the end of the day during which it was received, and to permit copying of any such report or statement by hand or by duplicating machine, requested by any person, at the expense of such person; and

(4) to compile and maintain a current list of all statements or parts of statements pertaining to each candidate.

PROHIBITION OF CONTRIBUTIONS IN NAME OF ANOTHER

SEC. 310. No person shall make a contribution in the name of another person, and no person shall knowingly accept a contribution made by one person in the name of another person.

PENALTY FOR VIOLATIONS

SEC. 311. (a) Any person who violates any of the provisions of this title shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(b) In case of any conviction under this title, where the punishment inflicted does not include imprisonment, such conviction shall be deemed a misdemeanor conviction only.

TITLE IV—GENERAL PROVISIONS

Extension of Credit By Regulated Industries

SEC. 401. The Civil Aeronautics Board, the Federal Communications Commission, and the Interstate Commerce Commission shall each promulgate, within ninety days after the date of enactment of this Act, its own regulations with respect to the extension of credit, without security, by any person regulated by such Board or Commission to any candidate for Federal office (as such term is defined in section 301(c) of the Federal Election Campaign Act of 1971), or to any person on behalf of such a candidate, for goods furnished or services rendered in connection with the campaign of such candidate for nomination for election, or election, to such office.

Prohibition Against Use of Certain Federal Funds for Election Activities

SEC. 402. No part of any funds appropriated to carry out the Economic Opportunity Act of 1964 shall be used to finance, directly or indirectly, any activity designed to influence the outcome of any election to Federal office, or any voter registration activity, or to pay the salary of any officer or employee of the Office of Economic Opportunity who, in his official capacity as such an officer or employee, engages in any such activity. As used in this section, the term "election" has the same meaning given such term by section 301

(a) of the Federal Election Campaign Act of 1971, and the term "Federal office" has the same meaning given such term by section 301(c) of such Act.

EFFECT ON STATE LAW

SEC. 403. (a) Nothing in this Act shall be deemed to invalidate or make inapplicable any provision of any State law, except where compliance with such provision of law would result in a violation of a provision of this Act.

(b) Notwithstanding subsection (a), no provision of State law shall be construed to prohibit any person from taking any action authorized by this Act or from making any expenditure (as such term is defined in section 301(f) of this Act) which he could lawfully make under this Act.

PARTIAL INVALIDITY

SEC. 404. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected thereby.

REPEALING CLAUSE

SEC. 405. The Federal Corrupt Practices Act, 1925 (2 U.S.C. 241- 256), is repealed.

EFFECTIVE DATE

SEC. 406. Except as provided for in section 401 of this Act, the provisions of this Act shall become ef-

fective on December 31, 1971, or sixty days after the date of enactment of this Act, whichever is later.

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

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No. 71-865

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E. ROBERT SEAVER,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
Petitioner,

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

This brief is submitted by Post-Newsweek Stations, Capital Area, Inc. ("WTOP") in response to the brief in opposition to the granting of a writ of certiorari filed by Business Executives' Move for Vietnam Peace ("BEM").

I

In its petition for certiorari, WTOP contended that this case is appropriate for plenary review because, among other reasons for review, it presents major issues of constitutional law not previously considered by this Court relating both to the First Amendment and to the "state action" doctrine (Pet. 7-11). BEM's opposition concedes that the lower court's "decision is constitutionally grounded . . . in the First

Amendment" but appears to dispute that fundamental legal issues are currently presented (Opp. 16).

The court of appeals' elaborate opinion, covering almost fifty pages of argument and analysis, belies any suggestion that the constitutional issues involved are unimportant, limited in scope or directly controlled by any decision of this Court. The decision represents the first judicial declaration that broadcasters are constitutionally obliged to sell "spot" advertising time to private individuals to express their personal views on issues regardless of whether those same issues have been fully and fairly covered by the stations in their normal programming. In short, this case falls directly in the line of cases where this Court has exercised its authority to consider claims that new constitutional rights should be recognized.[1]

BEM suggests that the decision below is narrow because it "did not order any broadcaster to put anyone in particular, not even BEM, on the air" (Opp. 13) and left unsettled the detailed procedures and limitations to be ultimately embodied in FCC guidelines (Opp. 15). Patently, this is far too modest a description of the lower court's sweeping constitutional pronouncements which curtail the long-respected discretion of broadcasters in their presentation of public issues and which elevate editorial advertising to the status of a new constitutional right. There is nothing grudging or unambitious about a decision which directed the Commission to establish rules that will require the entire broadcasting industry to sell time to countless unknown persons to express their private opinions or grievances on the airwaves.

WTOP also asserted in its petition, as an independent ground for certiorari, the direct conflict between the lower

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[1] *E.g., Griswold v. Connecticut,* 381 U.S. 479 (1965) (right of privacy); *Aptheker v. Secretary of State,* 378 U.S. 500 (1964) (right to travel); *Gideon v. Wainwright,* 372 U.S. 335 (1963) (right to counsel).

court's opinion and decisions in the First and Third Circuits.[2] The conflict exists on two separate issues: contrary to the court below, *McIntire* held that no private individual has a First Amendment right to broadcast and, in both *McIntire* and *Hildreth*, the courts held that a station's independent determination not to permit a broadcast does not constitute "state action." BEM's surprising assertion that there is no conflict requires only brief comment.

It is untenable for BEM to suggest that the "dispositive rationale" (Opp. 30) of both cases was that the district courts "lack jurisdiction" to pass upon the claims because primary jurisdiction of complaints is vested in the Commission. The First and Third Circuit opinions plainly show that those courts considered and passed upon the same constitutional issues in dispute here. The partial quotation from *McIntire*, on which BEM essentially relies (Opp. 31), is extracted from a prefatory description that the *McIntire* opinion itself characterized as "general observations respecting the background against which radio broadcasting stations licensed by the Federal Communications Commission operate." 151 F.2d at 599.

BEM also argues that the cases are distinguishable because they involved requests for program time rather than time for editorial advertising. The First and Third Circuit opinions, however, turned on no such distinctions but broadly rejected the First Amendment and state action theories adopted by the court below. The lower court's own opinion forthrightly recognized the conflict between the circuits. Far from seeking to distinguish *McIntire* and *Hildreth* on fanciful grounds, it simply declined to follow them (FCC Pet. 11a).

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[2] *McIntire v. Wm. Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946); *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950).

II

The greater part of BEM's opposition (Opp. 16-29) is given over to arguments that the constitutional issues presented are not "ripe" for review. Among the intertwined arguments, there appear to be two principal strands: BEM asserts that review now is premature both because the FCC has not yet issued the regulatory guidelines called for by the lower court and because facts allegedly necessary for proper judicial review have not yet been developed in the record.

Neither of BEM's contentions is sound in the present case. The first depends entirely on a misconception of the legal issue that WTOP seeks to have considered in this Court. The second argument, if it were accepted, would warrant not a denial of certiorari but summary reversal of the judgment below.

In support of its first argument, BEM's opposition cites and quotes a number of cases which have in varied circumstances declined to review agency determinations in advance of further resolution by the agency or attempted enforcement (Opp. 20-27). Thus, this Court has declined to pass upon agency determinations which were currently undergoing modification, or which might be clarified in the course of enforcement, or which might never be brought to bear against the complaining party at all.[3] These precedents have no relevance here because, contrary to BEM's suggestion, WTOP is not seeking review of "the legality of a regulation before it is put into effect" or even formulated (Opp. 20).

Far from anticipating legal issues that would arise under particular guidelines, WTOP has requested this Court to consider the anterior constitutional question squarely decided by the court below: whether the First Amendment requires a broadcaster to accept editorial advertising on controvercial

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[3] *E.g., Eccles v. Peoples Bank of Lakewood Village*, 333 U.S. 426 (1948); *A. L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324 (1961); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967). Compare *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

issues even though the broadcaster affords the same public issues detailed and balanced treatment in news, interviews and other programs and does so through a variety of representative outside spokesmen as well as through its own commentators. If the existing broadcaster practice in refusing such advertisements is lawful, then the FCC is not constitutionally obligated to formulate *any* guidelines and the decision below must be reversed.

Certainly it is premature to consider whether particular guidelines the Commission might promulgate in the event the lower court is affirmed are adequate, excessive, or otherwise subject to challenge, since the content of the guidelines is conjectural and their application uncertain. There is, on the other hand, nothing whatever conjectural or uncertain about the existing practice of the stations, declared by the lower court to be unconstitutional, nor about the decision's holding that access is constitutionally required. These issues, which logically and practically precede any question about the details of particular guidelines, are in no sense premature.[4]

In a related argument, BEM implies that the question whether the Commission is compelled to formulate editorial advertising guidelines is no longer important because the Commission has voluntarily decided to do so. The opposition states, for example, that the lower court's decision remands the case to the Commission "to explore . . . the adoption of rules that Agency was already considering adopting" (Opp. 20). In fact, what the Commission is considering in its pending *Study of Fairness Doctrine*, 30 F.C.C.2d 26 (1971), and what the lower court commands it to do are very different indeed.

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[4]Fundamental legal issues—whether, for example, a constitutional right exists or an agency has authority to regulate—are often necessarily resolved by the Court well before the precise dimensions or various applications of the right or authority are settled by subsequent cases. *E.g., Baker v. Carr*, 369 U.S. 187 (1962) (application of undefined equal protection principles to legislative apportionment); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (FCC authority over CATV sustained without passing upon CATV regulations).

In its broad-ranging investigation, the Commission has invited comments on the current operation of the fairness doctrine and, as one of several possible lines of inquiry, asked "*whether* there is any feasible method of providing access for discussion of public issues outside the requirements of the fairness doctrine." 30 F.C.C.2d at 33 (emphasis added). The court of appeals' decision does not permit the agency to "explore" this issue at all; quite the contrary, the decision resolves the issue in favor of required access for editorial advertisers, whatever conclusions the Commission may reach about the adequacy of the present regime or the infeasibility of requiring access.

Instead, the lower court has left to the agency only the task of implementing a policy that the Commission has rejected in the past and might well reject again if it were free to make its own determination. The broad policy inquiry the Commission intended to undertake in its *Study of Fairness Doctrine*—to consider whether some form of access is necessary or feasible—has become pointless if the lower court is sustained in its conclusion that editorial advertising is constitutionally compelled.[5] Of course, even the Commission's establishment of guidelines, as required by the lower court's decision, will be an exercise in futility if certiorari is denied now but the decision is overturned after the guidelines have been issued.

In a second line of argument designed to show that the present case is not ripe for review, BEM takes note of the important adverse consequences that broadcasters believe will flow from the new constitutional right of access created by the lower court (see Pet. 10-11, 15-18). Implicitly conceding

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[5]Pursuant to the lower court's mandate, the Commission has recently solicited comments to assist in developing guidelines for editorial advertising "in order to carry out the decision of the Court of Appeals." *Further Notice of Inquiry* in Docket No. 19260, FCC 72-117, adopted Feb. 4, 1972, p. 2. This, of course, is a far narrower inquiry than the originally planned investigation "whether" it is necessary or feasible to require access and if so in what form. 30 F.C.C.2d at 33.

that these consequences are relevant in deciding whether there should be a constitutional right of access, BEM complains that there is inadequate record evidence about the scope and impact of the dangers. Accordingly, its opposition asserts that review of the constitutional questions now would contravene decisions of this Court that such questions should not be abstractly decided in the absence of an adequate record (Opp. 25-29).

This argument impeaches rather than protects the court of appeals' decision. If the constitutional issues in question lack sufficient factual context and maturity to be resolved in this Court, then they were equally unfit for resolution in the court below. Consequently, if BEM's argument were accepted, the judgment of the lower court would have to be reversed and the case remanded to the Commission or held in abeyance to await the outcome of the general inquiry that the Commission originally proposed.[6]

Broad constitutional determinations of the kind involved in this case are customarily premised not on record evidence but on a court's own informed understanding based on prior experience and on information derived through judicial notice. Courts cannot hold legislative hearings before deciding upon general precepts, and prediction is inevitable in framing rules that can only be tested by the passage of years. Certainly with respect to editorial advertising, the supposed practical benefits of compulsory access, relied upon by BEM and the lower court, are not subject to support by record evidence.

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[6]It has not been suggested that the question whether an issue is ripe for adjudication depends on the court in which it is pending. On the contrary, the Court has treated ripeness as governed by general rules applicable to all federal courts (see, *e.g.*, *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967)) and has not hesitated to reverse the lower courts when they resolved issues prematurely or on inadequate records. See p. 8 & n. 7, *infra*.

Moreover, the advantages and disadvantages of required access are only one element in this case and it will be time enough to consider the need for further evidence bearing on those issues if and when they prove to be decisive. If, for example, this Court agrees that a broadcaster determination which is neither instigated nor compelled by the Commission is not "state action," then BEM's First Amendment claim fails at the outset. Or, this Court might well resolve the case against BEM on the strictly precedential ground, most recently expressed in *Red Lion Broadcasting Co. v. United States,* 395 U.S. 367 (1969), that the constitutional obligation of broadcasters is the fair presentation of "representative community views" rather than the sale to individuals of commercial "spot" announcement time to broadcast a capsule of their personal arguments and beliefs.

If, nevertheless, this Court were to decide now or on plenary review that the constitutional questions are not ripe because adequate factual information is lacking, then the proper procedure marked out by prior decisions of this Court is to vacate the decision below. This is precisely what the Court did in *Public Affairs Associates, Inc. v. Rickover,* 369 U.S. 111 (1962), which is cited in BEM's own brief (Opp. 22, 27).[7] That step, at least, would free the Commission to pursue the original inquiry which it conceived prior to the lower court's decision and which is directed to determining the need for and feasibility of an access regime.

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[7] Accord, *American Committee v. Subversive Activities Control Board,* 380 U.S. 503 (1965). In both cases, this Court, concluding that the record was not adequate for deciding the important legal questions involved, refused to decide the issues and vacated the decisions of the lower courts which had purported to resolve them. While these two decisions exemplify the customary procedure where adjudication is premature, they do not bear on the question whether the present case is ripe. In both the cited decisions, the undeveloped facts concerned the past actions of the individual litigants and related persons. There is no dispute here about WTOP's practice in this case.

III

The ultimate constitutional questions whether the First Amendment forbids the broadcasters' current practice and compels access for editorial advertising are, manifestly, issues of sufficient gravity and consequence to warrant review in this Court. For reasons already stated, these issues, which the lower court did not hesitate to decide, are equally ripe for adjudication here. In addition, there are urgent practical reasons for immediate review in this Court which were touched upon in the petition but deserve re-emphasis in view of BEM's prematurity argument.

From the broadcasters' viewpoint, the lower court's decision threatens to work a drastic alteration in a regulatory regime which for almost four decades has entrusted stations with basic responsibility for deciding what they shall broadcast. The petition has set forth at length the implications of these changes for the content of broadcasts, the legal responsibilities of broadcasters, and the financial viability of stations (Pet. 15-18).[8] If the lower court is wrong in its determination, review is imperative before its error becomes a *fait accompli* through the promulgation of Commission guidelines.

As the petition also demonstrated, an access regime will necessarily involve the Government to an unprecedented degree in determining what shall be broadcast and is likely to create a political advantage and imbalance in favor of those wealthy enough to afford editorial advertising (Pet. 10-11). The hazards to free speech interests in these consequences are at least as urgent as the comparable interests advanced by the lower court and deserve examination here before any access regime is instituted.

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[8]These important collateral consequences are generally disclaimed by BEM but its own brief confirms them. Thus, while stating that "the fairness doctrine . . . is not in any way affected by the court of appeals' decision" (Opp. 13), BEM's brief thereafter suggests the doctrine must be extended to require broadcasters to underwrite responses to editorial advertising that broadcasters were compelled to accept (Opp. 25, n. 62).

The process of agency administration would also be served by prompt review in this instance. If access guidelines are not constitutionally compelled, there is no reason why the Commission should devote its energy and resources to their implementation, at least in advance of a decision by the Commission that they are necessary and appropriate in the public interest. Indeed, until the lower court's decision is set aside, it makes no sense for the Commission to pursue its inquiry into the basic questions of need and feasibility which the court below declared are constitutionally predetermined. See p. 6 & n. 5, *supra*.

The same considerations favoring immediate review in this Court apply even if it be assumed that the lower court was correct and that some type of access regime must be devised. The adequacy and lawfulness of any guidelines that the FCC might hereafter contrive will, if constitutionally required, depend importantly on the scope and rationale of the underlying constitutional right as it is conceived by the courts.[9] Until this Court has provided guidance on the contours of any such right, any administrative guidelines the Commission may assemble are likely to prove a waste of energy.

Finally, it is unclear how the interest of those claiming a right of required access for editorial advertisements can be hampered by prompt review in this Court. Since the mandate of the lower court has not been stayed, the Commission is proceeding to develop guidelines so there will be no delay in implementing them if this Court reviews and sustains the decision below. It is thus illogical to argue, as BEM appears to do (Opp. 29), that immediate review in this Court can

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[9]If required access for editorial advertising is to be implemented, any number of related procedures, limitations, and consequences may depend on whether such access is based upon a Commission determination that it is in the public interest or whether it is compelled by the Constitution. For example, this distinction may have the most direct bearing on the control a station could exercise over the content of editorial "spots" and on the procedures that might apply when a "spot" were rejected.

interfere with the protection of any valid First Amendment claims BEM may have.

While major constitutional issues may properly be deferred until they are directly presented, this Court has been equally firm in stressing that when they are thus presented, they should be decided in this forum. Ultimately, "in our system . . . [the scope of the First Amendment] presents a question this Court cannot escape answering independently . . . ." *Thomas v. Collins*, 323 U.S. 516, 531 (1945). The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February, 1972

In The

Supreme Court of the United States

October Term, 1971

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 71-948

Columbia Broadcasting System, Inc.,
Petitioner,
v.
Democratic National Committee, *et al.*,
Respondents.

No. 71-964

Federal Communications Commission and United States of America,
Petitioners,
v.
Business Executives' Move For Vietnam Peace, *et al.*,
Respondents.

No. 71-965

Post-Newsweek Stations, Capital Area, Inc.,
Petitioner,
v.
Business Executives' Move For Vietnam Peace, *et al.*,
Respondents.

No. 71-966

American Broadcasting Companies, Inc.,
Petitioner,
v.
Democratic National Committee, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER AMERICAN BROADCASTING COMPANIES, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-863

COLUMBIA BROADCASTING SYSTEM, INC.,
Petitioner,

v.

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,
Respondents.

No. 71-864

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Petitioners,

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, *et al.*,
Respondents.

No. 71-865

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
Petitioner,

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, *et al.*,
Respondents,

No. 71-866

AMERICAN BROADCASTING COMPANIES, INC.,
Petitioner,

v.

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR PETITIONER AMERICAN BROADCASTING COMPANIES, INC.

OPINIONS BELOW

The opinion of the court of appeals (App. 446) is reported at 450 F.2d 642 (1971). The *Memorandum Opinion and Order* of the Federal Communications Commission in *Democratic National Committee* (App. 247) is reported at 25 F.C.C. 2d 216 (1970). The Commission's letter decision in *Business Executives' Move for Vietnam Peace* (App. 357) is reported at 25 F.C.C. 2d 242 (1970).

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1971 (App. 492). Petitions for rehearing were denied by an order of the court of appeals (App. 494) entered on October 4, 1971. Petitions for certiorari were filed on January 3, 1972, granted by this Court

on February 28, 1972, and a contemporaneous order of consolidation thereby entered. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the First Amendment to the United States Constitution and Sections 3(h), 315(a) and 326 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 153(h), 315(a) and 326.

The First Amendment to the Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 3(h) of the Communications Act of 1934, 48 Stat. 1065, *et seq.*, as amended, 47 U.S.C. 153(h), provides:

> " 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

Section 315(a) of the Communications Act of 1934, 48 Stat. 1088, as amended, 47 U.S.C. 315(a), provides:

> "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided,

that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Section 326 of the Communications Act of 1934, 48 Stat. 1091, as amended, 47 U.S.C. 326, provides:

"Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

QUESTION PRESENTED

Pursuant to the regulatory system established by the Communications Act of 1934, as amended, and administrative rules and policies formulated by the Federal Communications Commission, broadcast licensees are under a specific obligation to provide full and fair coverage of diverse viewpoints on controversial public issues. The question presented is whether, notwithstanding the foregoing obligation explicitly imposed by Congress and the Commission, the First Amendment additionally compels all broadcast stations to sell advertising time to individuals or groups for brief "spot" announcements asserting their particular views.

STATEMENT OF THE CASE

In these consolidated cases, this Court is asked to review a decision of the United States Court of Appeals for the District of Columbia Circuit holding that the First Amendment dictates that broadcasters be required —pursuant to a set of regulations to be devised by the Federal Communications Commission [1]—to sell advertising time for the presentation of individualized views on public issues. This ruling flatly overturned two separate opinions of the Commission which had found that broadcast licensees, who are required by the Commission's "fairness doctrine" to originate programs involving controversial issues of public importance, are not also required to sell time to individuals and groups for the advertising of their particular views. *Democratic National Committee*, 25 F.C.C. 2d 216 (1970);[2] *Business Executives' Move for Vietnam Peace*, 25 F.C.C. 2d 242 (1970).[3]

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[1] Hereinafter the "Commission" or the "FCC".

[2] App. 247.

[3] App. 357.

Petitioner American Broadcasting Companies, Inc. (hereinafter "ABC") participated in the *Democratic National Committee* case before the Commission and intervened in support of the Commission and the United States of America when the matter reached the court of appeals.

ABC, itself or through its subsidiaries, is the licensee of a number of radio and television stations and operates radio and television networks. In this capacity, both through the ownership of individual stations and the operation of broadcast networks, providing program material to hundreds of affiliated stations, ABC is a source for the production and transmission of significant amounts of news and public affairs broadcasts on a wide and ever-changing variety of public issues.

A. Agency Proceedings

The *Democratic National Committee* case [4] originated with a request by the Democratic National Committee (hereinafter "DNC") that the Commission issue a declaratory ruling that, as a general matter, broadcast licensees are required to sell broadcast time to "responsible entities, such as DNC, for the solicitation of funds and for comment on public issues." [5] Framed in this fashion, the DNC petition contained no assertions that any particular broadcast licensee either had failed to provide fair and full coverage of important public issues, or had refused to sell time for comment on controversial public issues. Indeed, the request contemplated that not-

[4] As noted, ABC was a party below only to the *Democratic National Committee* (Case No. 24,537 in the court of appeals) proceeding. Accordingly, in this Statement we concentrate on the *DNC* case and, for the most part, rely on the briefs of the Government and Post-Newsweek, Capitol Area, Inc. for a description of the agency proceedings in the companion *Business Executives' Move for Vietnam Peace* case (Case No. 24,492 below).

[5] App. 247.

withstanding such coverage or any individual offers of paid time for controversial issue comment, a general obligation remained as to all broadcasters to sell time to DNC and similar groups to present their viewpoints.[6]

Since the relief requested was partially premised on what DNC viewed as the restrictive nature of then existing policies of the three national television networks, the Commission solicited comments from the network companies.[7] ABC's response[8] set forth a number of internal policy standards which, *inter alia*, recognize an abiding responsibility to utilize the broadcast facilities under its direction in a manner which both safeguards and promotes the opportunity for the full exposure of representative views and controversial issues of general concern to the American people.[9] However, in a concomitant recognition of the public interest detriments and practical impediments associated with a universal and absolute right by *any* "responsible entity" to purchase time to espouse a point of view or solicit funds, ABC advised the Commission that it proposed to continue to adhere to its general approach of not selling time for controversial issue programs and announcements[10] and solicitation for funds, absent special public

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[6] App. 260.

[7] App. 35.

[8] App. 42.

[9] Such views and issues are presented in a variety of program formats which not only affirmatively allow for the exposure of partisan spokesmen and their views, but enable the presentation of such persons and groups on a free time basis—i.e., even in instances where the program may be wholly or partially sponsored, public issue spokesmen appearing thereon do not purchase this exposure.

[10] As the record reflects, ABC sells advertising time during both election and non-election periods to the major political parties for the solicitation of funds and for expression of views on public issues. In addition, during election campaigns, ABC sells

interest considerations. ABC did indicate, however, that although it was opposed to any ruling which would require the sale of time to *all* "responsible entities," it was prepared to accept—consistent with its policy of taking into account special public interest considerations—such orders for time from major political parties as could reasonably be accommodated.[11]

The ensuing Commission decision held that broadcasters must make time available "to significant political parties for the solicitation of funds" [12] but that important statutory and policy considerations militated against granting DNC or any other particular individual or group an absolute right of access to broadcast time for the purpose of commenting on controversial issues of public importance.[13]

The Commission emphasized that although under prevailing policies a licensee was by no means precluded

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advertising time to political parties, political candidates and their supporters, and to various spokesmen on public issues which are on the ballot.

[11] App. 46.

[12] The Commission found that the policies of three major networks (ABC, Columbia Broadcasting System, Inc. and the National Broadcasting Company, Inc.) were consistent with that portion of its holding. (App. 269).

[13] In a separate action on the same day, the Commission decided the companion case herein, *Business Executives' Move for Vietnam Peace* ("BEM") (App. 357). There, the Commission rejected the complaint of an anti-war group against Washington, D.C. Radio Station WTOP which had refused to sell spot advertising time to present that group's views on the Vietnam war. As in the *DNC* case, the central contention in the *BEM* proceeding was that the First Amendment required WTOP to sell BEM time for the presentation of its individual views, even though the station had fully complied with its fairness doctrine obligations with respect to the exposition of significant contrasting views on the Vietnam War issue. In its decision, the Commission found that the fairness doctrine had not been violated and, relying on its contemporaneous *DNC* decision, that the First Amendment did not require WTOP to sell advertising time to BEM to present its views (App. 368).

from selling time for controversial issue discussion, consistent with his fairness doctrine responsibilities, there were more compelling considerations that dictated the Commission's refusal to hold that a licensee is unyieldingly bound to sell time to particular persons or groups for the discussion of public issues over and above the exercise of his fairness doctrine responsibilities. A central element in weaving this conclusion was the Commission's recognition that the regulatory framework sanctioned by Congress in the Communications Act of 1934, as amended, deliberately avoided placing broadcasting in a "common carrier" mold. Thus, in contrast to common carriage, which is public in its availability but essentially private and passive in its communications function, broadcasting exists to simultaneously and indiscriminately communicate to the public at large.

As the Commission observed, this was the very role endorsed by this Court in *Red Lion Broadcasting Company* v. *FCC*, 395 U.S. 367 (1969)—a role which contemplates that broadcast licensees will perform in a "fiduciary" capacity for the entire public they serve. In this context, the Commission noted that in *Red Lion*, this Court had characterized the broadcaster's task as being oriented to the presentation of "representative community views on controversial issues." [14] This undertaking does not, however, comprehend the further dimension embodied in the DNC petition, that there is an obligation to sell time for the presentation of individual views which transcends the fairness doctrine right of the public to be informed. As the Commission remarked, a determination of this sort would entail a substantial reordering of the fairness doctrine and a direct assault upon the touchstone of broadcast regulation—i.e., the concept

[14] The Commission also pointedly emphasized that the obligation to present "representative views" was clearly intended to include views not held by the licensee and views expressed by non-station "partisan voices" (App. 259).

set in motion by Congress, and more recently sustained by this Court in *Red Lion*, that the public interest obligation of broadcasters is to devote a reasonable amount of time to issues of public importance and to do so in a fair manner. To *require* broadcast licensees to sell time for these purposes would mean that "the public's agenda for discussion of public issues would then be set substantively and increasingly by the affluent"—i.e., by those persons and organizations who have ". . . the financial resources and interest to purchase sustained access to the mass communications media. . . ." [15]

The Commission's decision, it must be emphasized, was not unmindful of the critical First Amendment interests at stake. However, unlike the court of appeals, the Commission reasoned that the *public's* First Amendment rights are better protected by the traditional regulatory scheme.[16] Accordingly, the Commission concluded that the present system of regarding licensees as "trustees" with an affirmative duty to present contrasting viewpoints through representative spokesmen, was of greater public benefit than—and could not reasonably co-exist with—a regulatory standard based on an individualized right of access.

Finally, the Commission addressed the position of dissenting Commissioner Johnson that the operation of a broadcast station is analogous to the administration of public facilities such as parks and municipal transit systems, and that once such a facility is utilized for some speech purposes the First Amendment requires that access be granted on the same basis to all potential customers.[17] In the Commission's view, the dissent failed to adequately assess the limited availability of radio

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[15] App. 263.

[16] App. 263-64.

[17] App. 266.

time and the obligation imposed upon broadcasters, but not upon other media, to fully and fairly inform the public on all significant positions involving controversial issues. The Commission also found the approach posited by the dissent to ignore or to blithely treat substantial practical as well as conceptual problems.[18]

B. The Court of Appeals Decision

Upon petitions for review of both the *DNC* and *BEM* decisions, a divided court of appeals reversed the separate decisions of the Commission—holding that, despite Congressional or agency policy to the contrary, the First Amendment requires broadcast licensees who sell time for spot advertisements for commercial products and services to make such advertising time[19] available to individuals and groups wishing to present their particular views on controversial issue subject matter.

The court determined that action by broadcast licensees constituted "state action" through the following syllogism. First, it found that broadcasting was undoubtedly a suitable medium for the communication of ideas. Secondly, since broadcast stations are "fiduciaries" of the public and operate only pursuant to a government license, the court found the broadcast business to have a public character. Finally, as to the specific cases on appeal, the court determined that there had been "approval of or acquiescense in" the challenged actions of the broadcasters by the Commission.[20]

Pursuant to the majority opinion, the newly articulated Constitutional right to purchase spot announcements for public issue discussion would obtain regardless of whether

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[18] App. 268-69.

[19] The court of appeals first drew a specific contrast with and thereby exempted from its ruling what was termed regular programming time. (App. 464).

[20] App. 461.

the licensee in question was in full compliance with the Commission's fairness doctrine. Indeed, the right could be invoked even in circumstances where the issue and precise viewpoint the individual or organization seeks to address has been specifically covered in prior broadcasts.[21] The court brushed aside contentions of the Commission and broadcasters that the agenda for public issue discussion would increasingly be established at the whim of those persons and organizations having the ready resources to gain exposure of their individual viewpoints.

The court of appeals was unpersuaded that issue discussion in this segment of broadcast time would be unduly influenced by those persons and groups having the financial wherewithal to purchase media access and that, in the process (1) licensees would face diminished control over program content and schedules and (2) the prevailing fairness doctrine principle that contrasting views be presented free of charge if sponsorship is unavailable[22] could, when applied to this form of editorial announcement, impair the broadcast industry's financial base. The court simply remanded the cases to the Commission for the purpose of developing "reasonable regulatory guidelines" to somehow accommodate these and other factors.[23]

Although the court suggested that stations could establish a quantitative limit on such "editorial advertising" and could regulate the placement of such advertisements within reasonable limits, clearly the licensee could not "exercise the same 'authoritative selection' in editorial advertising which he exercises in normal programming."[24] Furthermore, that the licensee would not be allowed to exercise his traditional journalistic role is

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[21] App. 469, 473.

[22] First stated in *Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963).

[23] App. 449, 488.

[24] App. 485.

emphasized in the court's assertion that a request to purchase time cannot be rejected for the reason that the viewpoint a person or group may wish to present has been repeatedly broadcast in the past.[25] Similar restrictions appear to exist in terms of the ability to reject such advertising time on the basis that the content has either a marginal level of public interest or is in some respects offensive or inappropriate.[26]

In a dissenting opinion, Judge McGowan characterized the Commission's task on remand as one of "heroic proportions", the complexity of which might undermine the basic premise on which it was founded. In Judge McGowan's view, the newly established First Amendment right announced by the majority could interfere and frustrate the right—so essential to this Court's prior ruling in *Red Lion*—of the public to be fully informed. The private licensee system of broadcasting provided by Congress, operating under "the obligation . . . to advance the public's right to know by devoting a substantial amount of time to the presentation of controversial views on issues of public importance," has proven to be an effective mechanism for implementing the desired public policy.[27] To now disregard this regulatory scheme for a new "system in which money alone determines what issues are to be aired" would, Judge McGowan concluded, represent an unwise and unnecessary course.[28]

Petitions for rehearing to the court below were denied.[29] This Court granted the several petitions for certiorari on February 28, 1972 and entered a stay of the mandate of the court of appeals.

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[25] App. 470-72.

[26] App. 469, 471-73, 477, 485.

[27] App. 490.

[28] *Ibid.*

[29] App. 495.

SUMMARY OF ARGUMENT

The decision of the court below is erroneously premised on a finding that the existing system of broadcast regulation, formulated and periodically recast by Congress and regularly administered by the Commission, is constitutionally deficient. Proceeding from this assumption, the lower court directed the Commission to establish guidelines to govern a new-found constitutional requirement that broadcast stations sell advertising time to individuals and groups for partisan "spot announcements" on public issues. While the lower court reiterated that it was asserting a limited right, the unequivocal constitutional basis therefor defies this characterization and clearly charts a course that goes beyond any demonstrated necessity to preserve First Amendment rights and undercuts a regulatory system fashioned by Congress which adequately serves First Amendment interests. Placing the individualized right to use broadcast facilities on a constitutional mantle in turn unnecessarily shakles the performance of the public trustee role created for licensees and renewed by this Court in its landmark decision in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

I.

It is now axiomatic that "unlike other media of expression, radio is inherently not available to all," *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226 (1943), and consequently, a mechanism for selecting *representative* spokesmen is essential. It is for this reason that the Constitution permits a licensing scheme which provides "for the use of such [radio] channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority." Section 301 of the Communications Act of 1934, 47 U.S.C. § 301. This unique characteristic of the broadcast medium also underlies previous rejections

by other courts of an individual right under the First Amendment to utilize broadcast facilities. *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3rd Cir. 1945), *cert. denied*, 327 U.S. 779 (1946); *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F. 2d 497 (1st Cir. 1950).

The holding of the lower court dramatically departs from these decisions while misreading the application of the First Amendment to broadcasting in this Court's opinions in *National Broadcasting Co.* and *Red Lion.* The cases relied upon by the lower court to construe broadcast operations as "state action" and to thereby transform broadcast advertising time into a common carrier type public "forum" are inapposite and irrelevant to a medium where designated licensees are required to act as trustees for the public interest—particularly in their affirmative obligation to maintain a full and fair flow of information, including contrasting and partisan views on public issues. Therefore, it is inappropriate to analogize broadcasting with municipal transit systems and other non-communications entities which, if they sell advertising space to commercial advertisers, do so without primary obligations for the dissemination of public information.

First Amendment objectives in broadcasting cannot be served by compelling individual stations—under guidelines devised by the Commission—to implement the kind of system of paid partisan access articulated by the lower court. The central constitutional concern in the area of broadcasting is "the First Amendment goal of producing an informed public capable of conducting its own affairs." *Red Lion*, *supra*, 395 U.S. at 392. Because of limited spectrum space that can be used for broadcasting, implementation of the essential rights at stake is necessarily shaped by this practical barrier. Consequently, First Amendment objectives in broadcasting are to be achieved, not by means of an individualized right of access, but in

the form recognized by this Court in *Red Lion*—i.e., a *collective* right of the public "to receive suitable access to social, political, esthetic, moral and other ideas and experiences." 395 U.S. at 390.

II.

A comprehensive regulatory scheme governing broadcasting was formulated by Congress based on the principle that the public's interest in receiving full and fair information on significant public issues could best be achieved through a formula of licensee trusteeship. Out of this formula have developed a number of operational criteria to insure that the statutory mandate of public service is carried out. Among these principles is the obligation, under the fairness doctrine, to devote a reasonable amount of broadcast time to the presentation of conflicting (including those of a partisan character) views on controversial issues. To date, this objective has been accomplished by the exercise of licensee discretion as to the selection of the spokesmen to appear and the subject material to be broadcast, subject to review by the Commission. Clearly, the licensee in this scheme is not a common carrier and the Communications Act specifically provides that he should not be a common carrier with respect to any of his operations.

Nothing before the lower court in these cases suggests that the First Amendment interests of the public in vigorous debate and effective self-expression are not being met through the operation of the present regulatory system. Indeed, the record reflects quite the contrary. Moreover, in the event there was evidence that any significant issues or viewpoints were being stifled, the Commission and Congress have sufficiently flexible authority to fashion those modifications which appear necessary to attain the essential objective of the fairness doctrine and the First Amendment interests that policy is intended to serve. In this respect, Congress has recently seen fit to amend the Communications Act to facilitate the

use of broadcast facilities by political candidates and the Commission is presently conducting a comprehensive inquiry which seeks to resolve whether present policies sufficiently foster the First Amendment goal of "uninhibited, robust, wide-open debate" or whether revisions or even new policies are appropriate.

III.

The practical ramifications of the lower court decision are actually fundamentally inconsistent with the First Amendment goals which it purportedly attempts to enhance. In designating broadcast advertising time as a quasi-public forum for the discussion of public issues at the initiative of private interests, the court of appeals severely inhibits licensee discretion so central to the proper vindication of the public's interests under the fairness doctrine. The requirement of an individual right of access actually diminishes the licensee's capacity to carry out his public trustee responsibility. Some of the factors contributing to this diminished capacity include weighting the initiation of public issue discussion in favor of those most able to afford the purchase of spot announcements, the need to select public issue programming to counter-balance the concentrated expression of views by private factions rather than on the basis of journalistic discretion as to newsworthiness, and the increased involvement of the government in the control of broadcast speech. In place of a public trustee system whereby broadcast licensees are accountable to the Commission as to which issues, views and speakers should be presented, the court of appeals would sanction a system of at random selection by those able to pay, expressing views on issues of self-interest and presented absent any standards of professional journalism.

In the final irony, if the "regulatory guidelines" that the lower court envisions as resolving some of the practical problems associated with the new constitutional right are

ultimately effective, they would actually thrust the federal government more directly into the decision-making process of determining and scheduling such broadcast content as news, cultural and public affairs programming. Clearly, the consequences of this course can hardly be said to enhance in any significant way the First Amendment interests that broadcasting is capable of fostering. Rather than the arms-length relationship between the government and broadcasters envisioned in the Communications Act as to the selection of program content, this decision foreshadows and even encourages the precise involvement that was intended to be avoided.

ARGUMENT

Introduction

These cases highlight the critical role the broadcast media play in keeping contemporary American society adequately informed on important public issues. That broadcasting in general and electronic journalism in particular have become major sources of information to the American public is, therefore, an undeniable threshold premise.

Into the bundle of intricate and interwoven rights and responsibilities that give broadcasting its unique regulatory and journalistic character, a negative and incompatible concept has been interjected. This concept is embodied in a newly asserted First Amendment "right" which would compel a broadcast station to sell "spot" advertising time for the expression of views on a controversial public issue without regard to previous and/or continuing coverage of the same issue based on news value criteria exercised in a traditional journalistic fashion.

Accordingly, this Court is asked to review the foregoing Constitutional contention, carried forward and re-

shaped by the court of appeals over the opposition of the agency charged with administering the Communications Act, because of its inevitable and profound consequences for all broadcast programming. In essence, to accept the new-found Constitutional right articulated by the lower court would be to reject important regulatory concepts derivative from the basic legislative framework and administrative policy based thereon.

In marked contrast to this Court's seminal decision in *Red Lion*, where the decisional context was whether certain regulatory measures were permissible under the First Amendment, here the lower court has held that, despite policy guidance by Congress or the Commission, the Constitution *compels* a divergent approach.

In this brief, ABC seeks to highlight the dubious new path that has been judicially drawn as well as to emphasize the very real practical impediments it engenders. Foremost in this evaluation, we believe, must be the recognition that the public interest is far better served by methods for the dissemination of ideas and experiences other than the personalized "right of access" recognized for the first time by the court of appeals.

I.

THE FIRST AMENDMENT DOES NOT COMPEL THE DESIGNATION OF BROADCAST ADVERTISING TIME AS A COMMON CARRIER TYPE FORUM IN WHICH BROADCAST STATIONS ARE REQUIRED TO SELL ANNOUNCEMENTS TO INDIVIDUALS OR GROUPS FOR THE PRESENTATION OF THEIR PARTICULAR VIEWS ON PUBLIC ISSUES

Congress has established, the courts have interpreted, and the Commission has long administered a statutory system for the broadcast media wherein licensees are

obligated to provide full and fair coverage of controversial public issues. As Judge McGowan correctly observed in dissenting to the lower court decision:

> "This is the system which Congress has, wisely or not, provided as the alternative to public ownership and operation of radio and television communications facilities. This approach has never been thought to be other than within the permissible limits of constitutional choice. . . ." [30]

Notwithstanding the order of events acknowledged by Judge McGowan, and irrespective of the Commission's determination that this scheme satisfactorily insures that the American public is adequately informed on significant public issues,[31] the court of appeals has ruled that the First Amendment dictates that broadcast advertising time should be placed on a common carrier type basis to permit individuals and groups to utilize spot announcements to espouse views on the same issues broadcasters are otherwise required to cover.

In determining that the First Amendment establishes a right of access to a particular segment of broadcast time, the lower court's decision is squarely in conflict with prior decisions on the matter. While cognizant of the well-established principle that the First Amendment applies to governmental and not to private actions,[32] the court below found that the interrelationship between the FCC and its licensees is such that broadcast station operation effectively represents "state action" to which First Amendment protections extend.[33] That basic finding, however—essential to the court's ultimate holding—as well as the consequent entitlements it implies, was

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[30] App. 490.

[31] App. 269.

[32] See, *e.g.*, *United States* v. *Guest*, 383 U.S. 745, 755 (1966).

[33] App. 458-64.

specifically eschewed in *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3rd Cir. 1945), *cert. denied*, 327 U.S. 779 (1946).

In rejecting a religious organization's claim that it had a statutory and First Amendment right to purchase time on a station for the broadcast of its programs, the Third Circuit expressly pointed out that the broadcaster "is not an instrumentality of the federal government" for constitutional purposes. *Id.* at 601. Rather, the court recognized that under the regulatory scheme established by the Communications Act, a significant separation between the broadcaster and the state is evident in Congress' having "confided the selection of program material to be broadcast to the taste and discrimination of the broadcasting stations." *Id.* at 600. The court explained:

> "True, if a man is to speak or preach he must have some place from which to do it. This does not mean, however, that he may seize a particular radio station for his forum. . . . [A] radio broadcasting station is not a public utility in the sense that it must permit broadcasting by whoever comes to its microphones." [34]

Similarly, in *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950), the First Circuit adopted the District Court's view that the conduct of broadcast licensees did not constitute "state action" as to which the First Amendment right of access asserted and upheld below would apply.

Significantly, the court of appeals specifically acknowledged the inconsistency of its decision with the First and Third Circuit decisions, but dismissed those decisions as representing a "crabbed judicial view of 'state action'." [35]

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[34] 151 F.2d at 600-01. See also *Avins* v. *Rutgers*, 385 F.2d 151, 153 (3rd Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

[35] App. 456. As noted, the *McIntire* court clearly rejected the view urged upon it that the respondent radio station was endowed "with the quality of an agency of the federal government", emphasizing

The lower court further found this Court's *Red Lion* decision—read to be "a clarion call for a new public concern and activism regarding the broadcast media" [36] —to clear the path of such "doctrinal impedimenta."

A. The Relevant First Amendment Objective Is to Guarantee That the Listening and Viewing Public is Not Left Uninformed—Not to Guarantee an Individual Right of Access.

This Court has, over the years, clearly emphasized that the essence of the First Amendment's protection of free speech and a free press is to protect the public generally, rather than particular private interests. See *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945); *Red Lion*, *supra*, 395 U.S. at 390. The objective in this process has been to assure that the general citizenry will have the necessary information to make the informed judgments on which a self-governing society is dependent.[37] In brief, the essential spirit of the free speech guarantee of the First Amendment is the right of the public to hear a diversity of viewpoints, thereby creating an informed public, and is not primarily founded upon

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that to so find "would be judicial legislation of the most obvious kind". *McIntire*, *supra*, 151 F.2d at 601. In rather dramatic contrast, the lower court in the instant cases not only found broadcast stations to be "agents of the government" but judicially inaugurated a sweeping reformation of the manner in which broadcasting is conducted—imposing completely new standards regarding the utilization of broadcast advertising time. See App. 448.

[36] App. 457.

[37] *Red Lion*, *supra*, 395 U.S. at 392. See also *Whitney* v. *California*, 274 U.S. 357, 375-377 (1927) (Concurring Opinion of J. Brandeis); *Time, Inc.* v. *Hill*, 385 U.S. 374, 388-89 (1967); *Greenbelt Cooperative Publishing Assoc.* v. *Bresler*, 398 U.S. 6, 11 (1970). In *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966), this Court remarked that "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."

protection of an individual right of self-expression. "[W]hat is essential is not that everyone shall speak, but that everything worth saying shall be said." Meiklejohn, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1960).[38]

It is virtually undisputed that the First Amendment applies to radio and television. Whatever doubts might once have existed about the applicability of the First Amendment to mass communications media were dispelled in *United States* v. *Paramount Pictures*[39] where this Court stated that it had "no doubt" that radio, newspapers and moving pictures were covered by the First Amendment. However, the operating and technical nature of broadcasting—a simultaneous and indiscriminate communications technique utilizing a limited spectrum—dictates that the First Amendment objective of an informed public be implemented in a special way. As this Court emphasized in *National Broadcasting Co.* v. *United States*:[40]

> "Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because

[38] See also *Banzhaf* v. *FCC*, 405 F.2d 1082, 1102 (D.C. Cir. 1968), *cert. denied sub nom. Tobacco Institute* v. *FCC*, 396 U.S. 842 (1969) where the District of Columbia Circuit remarked that "[d]ebate is not primarily an end in itself. . . ."

[39] 334 U.S. 131, 166 (1948). See also *Federal Communications Commission* v. *American Broadcasting Co.*, 110 F. Supp. 374, 389 (S.D. N.Y. 1953), *aff'd*, 347 U.S. 284 (1954); *Rosenbloom* v. *Metromedia, Inc.*, 415 F.2d 892 (3rd Cir. 1969), *aff'd*, 403 U.S. 29 (1971). In *Rosenbloom* v. *Metromedia*, the Third Circuit stated that "no rational distinction can be made between radio and television on the one hand and the press on the other in affording the constitutional protection contemplated by the First Amendment." *Id.* at 895.

[40] 319 U.S. 190 (1943).

> it cannot be used by all, some who wish to use it must be denied.[41]

Such considerations were integral to this Court's analysis of the First Amendment's application to broadcasting in *Red Lion*. Acknowledging at the outset that the natural dearth of frequencies necessarily limits the individuals who can broadcast, the Court concluded that "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." 395 U.S. at 388. Accordingly, differences in the characteristics of particular media "justify differences in the First Amendment standards applied. . . ." *Id.* at 386. See *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503 (1952). As to the broadcast media, it is the right of viewers and listeners which is "paramount" under the Constitution and may not be abridged. *Red Lion, supra*, 395 U.S. at 390. The peculiar characteristics of broadcasting underscore that this is to be achieved in the form of a collective right of the public "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Ibid.*

The court of appeals has drastically departed from the principles underlying application of the First Amendment to broadcasting developed in the *National Broadcasting Co.*, and *Red Lion* cases. In insisting upon a personalized right of access, irrespective of the licensee's coverage of controversial issues, the lower court has raised an individual right of self-expression over the First Amendment interests of the public as a whole. It has, therefore, created an individual right of access in the face of past teachings that the broadcast medium is uniquely unsuited for such a concept. While a similar right of access may be adequate or constitutionally mandated for a public park or municipal transit system, it is neither adequate nor constitutionally mandated for a limited speech forum represented by the commercial radio spectrum.

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[41] *Id.* at 226.

B. A Finding That Broadcast Operations Are "State Action" Is Fundamentally Inconsistent With the First Amendment Requirements for Broadcasting.

In reaching its conclusion that the First Amendment mandated a right of access to broadcast advertising time, the court of appeals found "state action" in the activities of broadcast licensees. In this analysis the court relied at least partially on prior holdings that transportation systems [42] and school newspapers [43] operated by a public authority, could not, if they accepted advertising at all, refuse paid editorials. However, broadcasting is not a "public authority" in the context that its normal use originates with at random individual members of the public. While broadcasting is specifically intended to be responsive to the needs of the public as a whole, it is not designed to be "held out" to the public at large for indiscriminate use by individual members of that public. Further, unlike public transportation systems, there is no question of excluding certain views or a particular form of speech in broadcasting, because the statutory and regulatory scheme will not permit such exclusion. With public buses the only speech format is the advertising; with broadcasting the primary speech format is non-advertising time. As to the newspaper cases cited by the lower court,[44] it is sufficient to note that they involved media actually owned by government institutions, whereas broadcasting is cast in a private enterprise pattern and is specifically insulated with First Amendment in-

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[42] *Wirta* v. *Alameda-Contra Costa Transit Dist.*, 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Reptr. 430 (1967); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (S.D. N.Y. 1967); *Hillside Community Church, Inc.* v. *City of Tacoma*, 76 Wash. 2d 63, 455 P.2d 350 (1969).

[43] *Lee* v. *Bd. of Regents*, 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971); *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D. N.Y. 1969).

[44] *Ibid.* See App. 472.

interests of its own in its relationship with the government.[45]

The lower court found state action under an even broader rationale. In this scenario, broadcasting is licensed and regulated in the use of designated spectrum space, and the airwaves "are 'a limited and valuable part of the public domain,' leased out temporarily by the federal government which retains ultimate control over them." [46] In essence, the court suggests that "state action" for First Amendment purposes stems from the circumstance that broadcasting is a regulated entity. But nearly every dimension of contemporary society falls either temporarily or permanently within the purview of some administrative agency at some level of government. It is also equally fruitless to suggest that the degree of regulation is determinative in this equation since this could comprehend qualitative factors and broadcasting connotes an enterprise where specific provision has been made to minimize "state" involvement.

In laying the legislative foundation for broadcasting, Congress deliberately elected to place primary responsibility for operational decisions with private licensees rather than the federal government. Inherent to that design, moreover, was the creation of a relationship which

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[45] See 47 U.S.C. § 326. The lower court also relied in this context on *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952) where this Court found that the activities of a bus company, which was privately owned but had operated under the regulatory jurisdiction of a government agency, amounted to "state action." Again, however, in this licensee situation the entity is one that normally holds itself out for the common carriage of the public, on demand, unlike broadcasting. Further, as noted, Congress has seen fit to fashion a specific regulatory regime in which, *inter alia*, a unique First Amendment relationship between government and private licensees has been forged.

[46] App. 460, quoting, in part, from *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966).

would minimize direct interference by the licensing authority. Accordingly, the state is specifically forbidden to directly exercise programming judgments (47 U.S.C. § 326) and the non-common carrier status of broadcasting (47 U.S.C. § 153(h)) precludes detailed supervision of many operational facets.[47]

It is clear, therefore, that the statutory structure established by Congress for the regulation of broadcasting, as well as the medium's practical development in American society, defy a categorization of radio and television as public forums in the sense normally attributable to a finding of state action. The overriding factor of broadcast operations is that primary responsibility for broadcast material is lodged not with the federal government, but in private entities operating as free from direct interference by the Commission as possible.

The most obvious thing about broadcasting is that it is unique as a communications instrument and, as such, is neither analogous to public streets, parks and facilities nor to regulated entities in the common carrier or public utility mold. Accordingly, such previous decisions of this Court as *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) and *Marsh* v. *Alabama*, 326 U.S. 501 (1946), form an inadequate basis for so drastically transforming the function and role of the broadcast media. While those cases extended the "state action" concept to protect First Amendment rights from infringement by persons and entities claiming a private function, the activities and "forums" involved totally inapposite circumstances—a company town (*Marsh*) and a suburban shopping center parking

[47] For instance, under Title II of the Communications Act, which governs such common carrier activities as telephone and telegraph, the Commission is empowered to regulate rate and profits of carriers, as well as the conditions of service. No such authority exists over broadcasting which is regulated under Title III of the Act.

lot (*Logan Valley*)—where, unlike broadcasting, the facilities had been dedicated to a previous at random public use. For instance, the owners in these circumstances had allowed general public access to the facilities, but denied access for peaceful picketing or leafleting. To argue that there is no "state action" in a traditional sense is not to say that broadcasting is not affected with a strong public interest character; rather, the point worthy of emphasis is that broadcasting simply cannot be equated with other speech forums in terms of its openness and ready availability to the public. For example, a state controlled newspaper is both state directed and unlimited in its capacity to add lines of type and pages of print. Similarly, a public park is, in the normal course, entered at the discretion of the public, not a private gatekeeper.

It has long been acknowledged that application of the First Amendment turns on the purpose and function of the medium of communication involved. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502-03 (1952). "The right to freedom of speech does not open every avenue to one who desires to use a particular outlet for expression. On the contrary, each particular avenue for expression presents its own peculiar problems." [48] In point of fact, the ease and manner of access to a particular forum must vary with the nature and limitation of that forum—conditions which must take into account the interests the forum is designed to serve beyond catering to individual requests. Accordingly, what is appropriate for a municipal park or bus terminal is not necessarily appropriate for a medium such as broadcasting that has journalistic responsibilities.

In the "state action" cases relied upon by the lower court, the person or entity required to permit access was

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[48] *Avins* v. *Rutgers*, 385 F.2d 151, 153 (3rd Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

engaged in no independent journalistic role, but served merely as a passive instrumentality for the speech activities of others. In other words, the function at issue was more traditionally one of common carriage where facilities are generally and principally publicly utilized. In broadcasting, licensees are charged with the duty to present the speech of others as well as their own with the ultimate responsibility for broadcast content resting with the stations.

In sum, by attaching a state action status to broadcast activities and creating a right of access to at least a portion of radio and television time, the court of appeals has misconstrued the previous decisions of this Court treating the relationship of broadcasting and the First Amendment. See, *e.g.*, *National Broadcasting Co.*, *supra*, 319 U.S. at 226. Indeed, in its more recent *Red Lion* opinion, this Court emphasized that "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." [49]

The plain meaning of *Red Lion*, we suggest, is that private interests must necessarily be subordinated to the paramount public interest in prudent utilization of the limited technical resource. Integral to such use is the presentation of "*representative* community views" on public issues. *Id.* at 394. (emphasis added). The critical right protected by the First Amendment as it applies to

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[49] *Red Lion*, *supra*, 395 U.S. at 388. Perhaps the ultimate irony of the lower court opinion in this regard is that, upon a finding of "state action" in broadcast operations, and the establishment of a broad constitutional right of paid partisan access to the medium, the court concludes that this "right" is "abridgeable" and might not be given any effect if a broadcast station carried no commercial advertising. (App. 475). Therefore, although non-commercial educational stations are fully comprehended by the statutory scheme and Commission regulations designed to enhance the public's right to full and fair information, they would presumably be exempt from the system initiated by the lower court.

broadcasting is the right of the viewing and listening public to be informed (*id.* at 390):

> "It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC."

The individual access result reached by the court of appeals is not only different from the collective public access right approved by this Court in *Red Lion*, it represents a disservice to the very First Amendment interests on which the opinion below relies. Furthermore—as we now demonstrate—irrespective of the lower court's erroneous conclusion that broadcast operations are "state action", a comprehensive and flexible regulatory scheme exists to ensure that broadcast stations do not discriminate against speech on public issues and that the First Amendment interests of the public are fully vindicated.

II.

AN INDIVIDUALIZED "RIGHT" TO PURCHASE SPOT ADVERTISING TIME ON BROADCAST STATIONS TO DISCUSS CONTROVERSIAL ISSUES WHICH HAVE BEEN COVERED IN OTHER BROADCAST PROGRAMMING IS FUNDAMENTALLY INCONSISTENT WITH THE SYSTEM OF REGULATION SELECTED BY CONGRESS.

In holding that private individuals and groups have a First Amendment entitlement to purchase spot announcements on broadcast stations, the court of appeals opinion represents, as we have shown, not only a misconception of this Court's prior decisions dealing with the relationship of broadcasting and the First Amendment, but also a fundamental inconsistency with the Congressional design of the broadcaster-federal government relationship fashioned in the Communications Act of 1934.

A. A Comprehensive Legislative and Administrative Framework Insures that Broadcast Licensees Serve the Public Interest Through the Presentation of Full and Fair Information on Significant Public Issues.

Since broadcasting, unlike other modes of expression, is inherently unavailable to all, it has been necessary to erect a mechanism to govern the inevitable selection process.[50] It was in recognition of this characteristic that the Commission in its early formulation of the fairness doctrine noted as follows:

> "In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups of individuals who might be more appropriate spokesmen for the particular point of view than the person making the request." [51]

In essence, prior to the lower court decision, the abiding concept was that it is the "right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his particular views on any matter, which is the foundation stone of the American system of broadcasting." *Editorializing Report*, 13 F.C.C. at 1249; see also *Red Lion*, *supra*, 395 U.S. at 390 (1969). Indeed, the District of Columbia Circuit has recently reaffirmed an earlier statement made by a different panel of that court, in a case decided prior to the instant cases, that no individual or group has a right of access. Thus, in dealing with the Democratic National Committee contention that the DNC had an organiza-

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[50] See *National Broadcasting Co., supra*, 319 U.S. at 226; *Red Lion, supra*, 395 U.S. at 388.

[51] *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1251-52 (1949).

tional right to broadcast time to respond to Presidential appearances, the court concluded as follows:

> "We believe DNC's position to be fallacious and point to our recent decision in *Green* v. *FCC* [447 F.2d 323, 328 (D.C. Cir. 1971)], where we state that no individual or group 'has the right of access to the air; the licensees may exercise their judgment as to what material is presented and by whom'." [52]

The lower court, we submit, too conveniently ignores the conceptual underpinning of the broadcast media and the practical conditions which have grown up around broadcasting. Rather than attaching a common carrier status to broadcasting, Congress specifically chose to establish a system under which limited-term licenses are granted for use of broadcast frequencies,[53] and licensees are committed to operate their facilities in the "public interest." [54] This system entails a procedure of periodic review to ensure that the overall operation of given broadcast facilities is consistent with the needs and interests of the respective communities involved.

Under the broad public interest standard, a number of operational criteria have developed. Thus, out of the statutory mandate of public service have evolved such basic principles as (1) the licensee obligation to periodically survey communities served in order to ascertain problems and interests [55] and (2) the obligation, under

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[52] *Democratic National Committee* v. *FCC*, D.C. Cir., No. 71-1637, decided February 2, 1972, slip op., p. 37, *petition for certiorari pending* (Case No. 71-1405).

[53] Section 307(d) of the Communications Act. 47 U.S.C. § 307 (d).

[54] The guiding standard of the Communications Act is that the allocation of facilities and their continued utilization serve the "public convenience, interest, or necessity." See *e.g.*, 47 U.S.C. §§ 307(a) and 309(a).

[55] *Suburban Broadcasters*, 30 F.C.C. 1021 (1961), *aff'd sub nom. Henry* v. *FCC*, 302 F.2d 191 (D.C. Cir. 1962); *Minshall Broadcasting Co.*, 11 F.C.C. 2d 796 (1968); *Primer on Ascertainment of Problems By Broadcast Licensees*, 27 F.C.C. 2d 650 (1971).

the fairness doctrine, to devote a reasonable amount of broadcast time to the presentation of conflicting (including those of a partisan character) views on controversial issues. A further distinguishing characteristic of the broadcast medium, therefore, is that different licensees meet their responsibilities in different ways. This is not only reflective of the statutory scheme and the Commission policies which promote flexibility in serving public needs and disseminating news and information, it is a logical and necessary consequence of the variety of broadcast facilities.[56]

Any suggestion that significant viewpoints are excluded from the broadcast airwaves is simply unfounded on the record in these cases. Indeed, the complainant groups below (DNC and BEM) acknowledge either implicitly or explicitly that they seek a special kind of access to the broadcast media that ignores consideration of whether a particular viewpoint has previously been presented on broadcast stations[57] and, in this context, whether the public has been adequately informed as to that viewpoint. The fact is that neither the Commission nor the court below has made a finding that the fairness doctrine and other administrative policies flowing from the legislative framework established by Congress are in-

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[56] In addition to the three major television networks (and some special networks), there are at least seven national radio networks (plus the recent announcement of Black-oriented and Spanish-language radio networks, *FCC News Release*, No. 10624, April 26, 1972). Also see *F.C.C. Public Notice No. 85462*, released June 7, 1972, indicating that as of May 31, 1972, there were 4368 commercial AM radio stations; 2,341 commercial FM stations; and 701 commercial television stations. In addition, there were 518 educational FM stations and 214 educational television stations.

[57] For example, in the *BEM* case the record shows that WTOP had presented a wide variety of representative views on the Vietnam War, including the specific viewpoint BEM sought to broadcast. In the *DNC* case, the complainant had not even specified the issues or particular viewpoints it wished to express.

sufficient to satisfy the First Amendment interest of an informed public. Indeed, the Commission was of the very opposite persuasion, that the present regulatory system affirmatively serves the paramount right of the public to receive access to information on significant issues and experiences, and that engrafting an individual right to purchase advertising for these purposes would actually inhibit and frustrate the overall public interest objective.[58]

Accordingly, the record in these cases will not support a contention that the public faces any informational gap or, indeed, that most licensees do not now afford sufficient access for ideas and opinions expressed by partisan voices. Nevertheless, the court of appeals has determined that there should be a right of access to a limited kind of broadcast time without consideration of the degree of access that is available in different forms on the multitude of broadcast stations throughout the country. In contrast, of course, the administrative agency given the responsibility for measuring public needs in this regard has concluded that although (1) there is no present deficiency in the information the public receives[59] (2) a general reexamination of contemporary requirements and procedures is nevertheless warranted.[60] Additionally, it is important to emphasize that no Commission policy precludes any station from selling any type of broadcast

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[58] See, *e.g.*, App. 269.

[59] App. 258.

[60] Accordingly, the Commission has recently launched an administrative proceeding which, in the context of the fairness doctrine, represents a comprehensive exploration of the process by which public issue information is disseminated via the broadcast media. The specific objective of this proceeding is to ascertain what problems, if any, exist and, where appropriate, to devise suitable solutions therefor. See *In re Notice of Inquiry in Docket No. 19260*, 30 F.C.C. 2d 26 (1971).

time to persons and groups for the discussion of controversial issues.[61]

By singling out a certain block of broadcast time and enveloping the right to purchase such time in a constitutional mode, the court of appeals introduces a new conceptual standard that will adversely affect all broadcast programming. Under the existing broadcast system, it is not necessary to set aside a definable time period for the expression of viewpoints; a typical broadcast station already accomplishes this, and more effectively, in a number of different ways. These include, *inter alia*, replies to editorials, the appearance of private and public officials in discussion and documentary programming, telephone call-in programs, guest appearances on entertainment/talk shows, the reading of viewer's written opinions and editorial "feed-back" programs, the open-mike procedure allowing listeners to telephone in comments which can be taped and then re-broadcast, the carriage of editorials suggested by members of the public and interviews within news programs.[62]

The record in these cases clearly offers no support for a conclusion that the present system of broadcast regulation does not adequately serve the paramount First Amendment right of the public to be informed. Furthermore, the regulatory regime set out by Congress not only does not require broadcast licensees to sell advertising time to individuals or groups to present their particular views on public issues,[63] it deliberately rejects a system of individual access.

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[61] App. 265.

[62] See Alfred I. DuPont—COLUMBIA UNIVERSITY SURVEY OF BROADCAST JOURNALISM 1970-1971, pp. 7-31.

[63] A fact conceded by the court below (App. 455).

1. ***The Public Trustee Concept Underlying the Statutory Standard Deliberately and Inherently Rejects A Common Carrier Role For Broadcasting.***

In setting the legislative foundation culminating in the Communications Act of 1934, Congress affirmatively rejected the proposition that the broadcast media should be subjected to an individualized right of access. One of the clearest manifestations of this fundamental decision is found in Section 3(h) of the Act which expressly provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(h).[64] Any standard

[64] Not only the plain language of the statute, but the legislative history indicates that the decision by Congress to reject a common carrier status for broadcasting, and consequently to make licensees responsible for program selection and content, was a deliberate decision. For instance, during the early debate on the Radio Act of 1927 (44 Stat. 1162), Congress considered and subsequently rejected the notion that broadcasters should be charged with a common carrier responsibility. In deliberations leading to enactment of the 1927 Act, the original bill as reported by the Senate Committee contained a common carrier provision to the effect that "if any licensee shall permit a broadcasting station to be used . . . for the discussion of any question affecting the public, he shall make no discrimination as to the use of such broadcasting station, and with respect to said matters, the licensee shall be deemed a common carrier in interstate commerce." 67 CONG. REC. 12503 (1926); S. REP. NO. 772, 69th Cong., 1st Sess. 4 (1926). However, this language was deleted from the committee bill by the full Senate. See 67th CONG. REC. 12501-02 (1926). A subsequent revision of this portion of the bill resulted in Section 315 affording reply opportunities only in the limited situation involving political candidates. In the Conference Report that followed, Congress reaffirmed the conclusions reached in the Senate debate that it would be unwise to cloak broadcasting with a common carrier status. See 68 CONG. REC. 2567 (1927). Several years later during deliberations on the successor Communications Act of 1934, efforts were renewed to legislate some form of broadcast media access. For instance, Congressman McFadden proposed that broadcasting stations be forbidden to discriminate against programs sponsored by any religious, charitable or educational association. H.R. 7986, 73rd Cong., 2d Sess. (1934). The Federal Radio Commission opposed the Mc-

along the lines suggested by the court of appeals that broadcast licensees must make one segment of their broadcast time an open forum (however modified) for the sale of time to persons and groups for the presentation of their views on public issues, would, in effect, make broadcasters "common carriers" in contravention of the express language of Section 3(h) of the Communications Act—and in basic disharmony with the public trusteeship formula otherwise characteristic of the broadcast section of the legislation.[65]

The plain meaning of the statutory language and the legislative history which rejects placing broadcasting on a common carrier basis, has been, up to now, consistently affirmed by judicial interpretation. In *McIntire* v. *William Penn Broadcasting Company*, 151 F.2d 597 (3rd Cir. 1945), *cert. denied*, 327 U.S. 779 (1946), the Court of Appeals for the Third Circuit held that it would be inconsistent with the Communications Act to hold that a religious organization had a right to purchase time on a station for the broadcast of its programs. The court stated that "it is clear from history and the interpretation of the Federal Communications Act that the choice of programs rests with the broadcasting stations licensed by the FCC", and that "Congress has confided the selection of program material to be broadcast to the taste and discrimination of the broadcasting stations." *Id.* 599-600. Consequently, "a radio broadcasting station is not a public utility in the sense that it must permit broadcasting by whoever comes to its microphones." *Id.* at 601. See

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Fadden Bill and it was not reported out of committee. *Hearings on H.R. 8301 Before the House Committee on Interstate and Foreign Commerce*, 73rd Cong., 2d Sess. 349-52 (1934). Accordingly, as finally adopted, the Communications Act of 1934 specifically declared that broadcasters are not to be deemed common carriers.

[65] Compare 47 U.S.C. §§ 307(a), 308(a), 309(a) and 315(a). See also Section 326 of the Act, 47 U.S.C. § 326.

also *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940).

We believe that the essence of the *McIntire* and similar decisions was recognized by this Court in *Red Lion*. The thrust of that decision is not that the broadcast licensee is a common carrier, required to sell time to all applicants on public issues, but rather that he is a public trustee—a proxy—who must present *representative* community views and voices on controversial issues. The decision thus stresses the right of the public to be informed—not the right of the broadcaster or any individual or group to speak over given broadcast facilities.

In summary, the regulatory system established by Congress proceeds from two interrelated principles. One, rather than sharing the common carrier monopoly role ascribed to telephone and telegraph, broadcasting was to be characterized by private ownership operating on frequencies assigned under a public interest standard by an expert regulatory agency. Secondly, the designated licensees of such frequencies, in marked contrast to the passive role of common carriers under the Communications Act, were to bear an affirmative responsibility for the content of material broadcast, acting in a trustee capacity for the public at large. This initial legislative distinction shapes and permeates our entire system of broadcast regulation.

2. *Developments In Administrative Interpretation and Statutory Amendment Demonstrate the Viability of the Public Trustee System.*

Commission administration of the legislative scheme, and amendments thereto by Congress over the years, cumulatively reflect the vitality and practical wisdom of the threshold decision that broadcasters are to be trustees for the public, not common carriers. Moreover, pertinent developments aptly demonstrate that the sys-

tem designated by Congress is capable of making adjustments which, in a contemporary setting, appear necessary to continue to serve as well as preserve the public's paramount right to be informed.

Issued fifteen years after passage of the basic statute, the Commission's *Report on Editorializing by Broadcast Licensees*[66] represents the agency's most comprehensive articulation of the fairness doctrine[67] which—while not in the 1934 Act—was adopted in recognition of the public's right to receive full and fair information on all significant issues. This Report was issued in connection with public hearings designed to clarify the obligations of broadcast licensees and to explore various problem areas.[68] The Report emphasized that the licensee was to perform as a public trustee, and, in this capacity, could determine what should be broadcast and by whom, making such decisions in a manner that would promote the public's First Amendment interests in free and open debate. In the Commission's words[69]:

> "Only where the licensee's discretion in the choice of the particular programs to be broadcast over his facilities is exercised so as to afford a reasonable opportunity for the presentation of all responsible positions on matters of sufficient importance to be

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[66] 13 F.C.C. 1246 (1949).

[67] The doctrine, however, had been enunciated in one form as early as 1929 by the Federal Radio Commission. See *Great Lakes Broadcasting Co.*, 3 F.R.C. Annual Report 32 (1929).

[68] *Report on Editorializing, supra,* 13 F.C.C. at 1246. See also note 60, *supra,* describing more recent activities of the Commission in this regard. In the pending proceeding initiated in 1971, the Commission has framed the basic objective of its current review as being directed to an examination of whether Commission policies promote to the maximum extent possible the national goal of fostering "uninhibited, robust, wide-open" debate on public issues. *In re Fairness Doctrine Study, supra,* 30 F.C.C. 2d at 27.

[69] 13 F.C.C. at 1250.

> afforded radio time can radio be maintained as a medium of freedom of speech for the people as a whole. These concepts, of course, do restrict the licensee's freedom to utilize his station in whatever manner he chooses but they do so in order to make possible the maintenance of radio as a medium of freedom of speech for the general public."

Therefore, the essential ingredient of the fairness doctrine as originally formulated was the principle that the public interest is best served by requiring the presentation of opposing viewpoints on controversial issues under the supervision and control of licensees. In 1969 when this Court addressed the fairness doctrine and its extension in the political editorializing and personal attack rules,[70] the main thrust in sustaining these Commission policies was the paramount First Amendment interest that resided with the public at large. *Red Lion, supra,* 395 U.S. at 390.

At about the same time the Commission was developing and refining the fairness doctrine, repeated attempts were being made in Congress to expand the coverage of Section 315 of the Communications Act which had been originally fashioned only to extend "equal opportunities" to opposing political candidates in the use of broadcast

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[70] These rules represent an instance in which the Commission deemed it necessary to formulate detailed and definitive guidelines to govern licensee conduct in certain limited circumstances (See note 90, *infra*). Otherwise, the fairness doctrine has been refined over the years on a case-by-case basis. See *Applicability of the Fairness Doctrine to Broadcast Licensees*, 29 *Fed. Reg.* 10415 (1964). The Commission has, moreover, modified the fairness doctrine as it applies to political broadcasts to the extent of adopting a "quasi-equal opportunities" approach in defined instances. For example, it has recently ruled that when a station sells time to spokesmen for or supporters of a political candidate during an election campaign, it must likewise make time available on the same basis to spokesmen for or supporters of opposing candidates. *Letter to Nicholas Zapple*, 23 F.C.C. 2d 707 (1970).

facilities.[71] In brief, despite such attempts to expand the coverage of Section 315 to spokesmen for candidates and other election issues[72]—Congress has carefully circumscribed the purview of Section 315.

In the first significant modification of that provision —the 1959 amendments—Congress actually refined the scope of Section 315 by exempting from the equal opportunities requirement appearances by candidates on newscasts, news interviews, news documentaries, and on-the-spot coverage of news events. 73 Stat. 557 (1959). Thus, Congress intended to restrict the right of individual access for candidates to broadcast facilities and thereby preserve to the greatest extent possible journalistic discretion in broadcasting.[73]

Of perhaps even greater significance, the 1959 amendments also saw Congress ratify and adopt the Commission's fairness doctrine as part of the public interest standard[74] by the addition of this sentence to Section 315(a)[75]:

> "Nothing in the foregoing sentence [containing the news exemptions] shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and

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[71] See note 64, *supra*.

[72] See, *e.g.*, H.R. 3595, 80th Cong., 1st Sess. (1947) (to extend "equal opportunities" to spokesmen for political candidates, political parties, the discussion of referendum questions and the discussion of differing viewpoints on public questions); H.R. 6949, 81st Cong., 2d Sess. (1950) (similar to H.R. 3595, but not inclusive of public issue discussion); H.R. 11851, 87th Cong., 2d Sess. (1962) (opportunities for response required when an individual is subject to ridicule by a candidate utilizing Sec. 315 time).

[73] See H.R. REP. No. 802, 86th Cong., 1st Sess. 4-7 (1959); S. REP. No. 562, 86th Cong., 1st Sess. 9, 13-14 (1959).

[74] See *Red Lion*, *supra*, 395 U.S. at 381-85.

[75] 47 U.S.C. § 315(a).

> on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Since the concept of licensee discretion and responsibility, as distinguished from an individualized right of access, is central to the fairness doctrine, the absorption of this Commission policy in the 1959 statutory amendments makes the concept an integral part of the basic legislative fabric.

The dynamics of the legislative process as it bears on our communications system is also reflected in the 1972 amendments to the Communications Act. These amendments not only vastly alter the requirements pertaining to the use of the "communications media" for political purposes,[76] they are indicative of the role Congress is able to exert in overseeing the basic statutory system. Just as Congress initially rejected a common carrier role for broadcasting—electing instead to place programming responsibility with licensees—in a more contemporary environment it has responded to what it perceived as a special need in the political area.

Accordingly, the newly enacted Campaign Communications Reform Act[77] amends the Federal Communications Act to require broadcast licensees to allow reasonable access to their facilities by candidates for federal elective office. Section 103(a)(2)(A) of this Reform Act

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[76] Among the major changes effectuated by the 1972 amendments are the establishment of spending limits by some political candidates in the communications media, greatly modified campaign contributions reporting requirements, and the fixing of maximum rates various media may charge for the use of their facilities by political candidates. See CONF. REP. No. 92-580, 92d Cong., 1st Sess. (1971).

[77] PUB. L. No. 92-225, Title I (February 7, 1972).

amends Section 312(a) of the Communications Act to read as follows[78]:

> "The Commission may revoke any station license or construction permit—
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> > (7) for willful or repeated failure to allow reasonable access to or permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."

Section 103(a)(2)(B) of the new statute amends Section 315(a) of the Communications Act[79] by adding the three italicized words to the following language:

> "No obligation is imposed *under this sub-section* upon any licensee to allow the use of its station by any [political] candidate." (Emphasis added).

These amendments are, therefore, consistent with previous Commission and Congressional determinations that the public interest requirements for the presentation of issues of public importance within the inherent limitations of the broadcast spectrum are a practical task peculiarly suited to resolution by Congress or by the Commission. They are also reflective of the awareness and ability of Congress to modify the basic legislation so as to grant or preclude such individualized media access as is deemed necessary[80] and consistent with the overall

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[78] 47 U.S.C. § 312(a).

[79] 47 U.S.C. § 315(a).

[80] See, *e.g.*, S. J. RES. 209, 91st Cong., 2d Sess., introduced by Senator Fulbright on June 10, 1970 and subsequently considered but not acted upon by the Senate Subcommittee on Communications. This measure was designed to develop a Congressional right of access to counter-balance the use of television by the Executive branch of the government. It would have amended Section 315 of the Communications Act to provide that licensees set aside "a reasonable amount of public service time to authorized representatives [of Congress] to present the views of the Senate and the House of Representatives on issues of public importance."

regulatory scheme—a pattern which vests with licensees the responsibility to choose, subject to their obligations under the fairness doctrine, what issues should be covered, what manner of presentation is most appropriate and what spokesmen are best suited to present the various sides of such issues.

III.

THE DECISION OF THE COURT OF APPEALS WILL SUBSTANTIALLY IMPEDE THE PERFORMANCE OF A LICENSEE'S PUBLIC TRUSTEE ROLE, DIMINISH THE EXERCISE OF A BROADCASTER'S JOURNALISTIC DISCRETION, AND INCREASE GOVERNMENTAL CONTROL OF BROADCAST SPEECH.

Reversal of the lower court's decision is particularly warranted in light of the substantial adverse impact its implementation will have on the broadcast industry generally, and on the future administration of the Communications Act. As noted, the American system of broadcasting has been founded on a recognition that by its inherent nature the medium cannot be available to all,[81] and a determination that broadcasters, rather than government, should perform the function of determining who can be accommodated.

In performing that dimension of his "public trustee" role involving the selection of material to be broadcast, the licensee is guided by a standard which anticipates a "diligent, positive and continuing effort . . . to discover and fulfill the tastes, needs and desires of his community or service area." [82] Generally, this entails a discretionary

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[81] *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226 (1943); *Larus & Brother Co.* v. *FCC*, 447 F.2d 876, 882 (4th Cir. 1971).

[82] *En Banc Program Policy Statement*, 20 Pike and Fischer, Radio Regulation 1901, 1915, 25 Fed. Reg. 7291, 7295 (1960).

allocation between entertainment and non-entertainment programming, and determinations as to the scheduling and time devoted to such program categories as education, religion, sports, minority interest, news and public affairs.

This fundamental regulatory principle has also been the essential predicate for the Commission's fairness doctrine which, while requiring treatment of opposing views on controversial issues, permits licensee discretion in the selection of spokesmen, schedules and program format. Under the terms of the lower court's decision, however, that discretion is significantly diminished; broadcasters would apparently no longer be able to decide to exclusively meet their "fairness" obligations by public affairs and news programming, even though this may seem to be the approach best designed to *inform* the public.[83]

The likely practical effects of the court of appeals opinion include weighting the initiation of public issue discussion in favor of those most able to afford the purchase of "editorial advertising," the resultant heavier involvement of the Commission in disputes over who is to have access, and the transformation of public affairs programming from an innovative, self-initiating posture to something more and more restricted as it is increasingly employed as a responsive device for spot announcements.

Although the lower court attempted to discount the serious consequences of its ultimate holding with a corrollary declaration that there is no absolute right in any

[83] The lower court actually acknowledges the essentially distorted and artificial expression of viewpoints possible from their presentation in a fleeting 20 or 30 second form. "We recognize, of course, that the onesidedness and private editing of particular 'spot' editorial advertisements may in the end steer viewers and listeners away from the 'truth' by distorting complex issues." (App. 472). Objective information value would be even further diminished by the non-applicability of such policies as the fairness doctrine to private "editorial advertisers" and the absence of professional journalism standards.

person or group to air any particular "editorial advertisement" [84] and that licensees need only accept *some* such announcements under guidelines to be devised by the Commission,[85] the practical detriments to the overall public interest are not so easily avoided. Clearly, if a right of broadcast access is to be individualized on a constitutional mantle, the process of promulgating and enforcing "reasonable" rules cannot avoid impairment of a licensee's capacity to fulfill his overall obligations to the public.

Two principal characteristics typify network and station advertising time—it is limited (especially in "prime time" when heavy demand accentuates the inherent time restrictions) and it is expensive. Under the system established by the court of appeals, a premium is automatically placed on wealth in at least initially using broadcast facilities to disseminate controversial issue advertisements. Consequently, undue encouragement is given to the exposure in this format of either (1) the *side* of a controversial issue espoused by those of greatest wealth or (2) the limited *issues* which only attract well financed competing groups. This not only produces an unwarranted discrimination against particular viewpoints and particular issues, but represents a direct impediment to the paramount right of the public to be informed by receiving access to a broad range of social, political and other ideas and experiences. *Red Lion*, *supra*, 395 U.S. at 390.

A less tangible but equally pertinent impact of the system imposed by the court of appeals decision is that broadcaster independence in the news and public affairs area is necessarily diminished to the extent there may be a need to place such programming in a contrasting posture to the paid controversial issue announcements of

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[84] App. 482.

[85] App. 482, 485.

others broadcast throughout the day, week or month. In the normal course, news and public affairs programming is designed to be responsive to the fluctuating needs and interests of the public as a whole. To a significant extent, therefore, public events and problems determine program relevance. However, the changes set in motion by the court of appeals are potentially disruptive of this traditional journalistic process. For in many cases broadcasters will be forced to consider factors other than news value as a motivation for public affairs programming—placing increasing emphasis in content selection on matters which, irrespective of primary news value, may be the subject of extended treatment in spot announcements prepared by controversial issue advertisers.

Thus, unless one assumes that issues initiated by advertisers—issues which, because of a lack of newsworthiness, a broadcaster may not have intended to cover—can be adequately covered exclusively by paid spot announcements, a broadcaster would be expected to devote a certain amount of his regular "program" time (news, public affairs, etc.) to the presentation of contrasting views in order to discharge his public trustee role of keeping the public adequately informed on the issues. In brief, the broadcaster will not only be forced to relinquish a degree of control in initially selecting his news and public affairs programming, he may have to substitute programming representing a view contrary to that expressed in a concentrated series of spot announcements for programming previously planned on a subject matter of greater relevance to his audience. This anomaly was recognized by dissenting Judge McGowan who correctly characterized the distorted design nominated by the majority below as one wherein:

> ". . . money alone determines what issues are to be aired, and in what format, even assuming as is likely to be the case, that those issues, whatever they may prove to be, compare favorably with the

> intellectual content of the great bulk of commercial advertising. The responsibility for informing the public is now squarely on the licensee. That responsibility will only be diluted and obscured by requiring the licensee, against his own better judgment, to accept paid editorial advertising." [86]

Thus, mandating the sale of spot announcements for the individual expression of views on public issues, without the exercise of journalistic judgments by licensees as to the newsworthiness of the matters to be discussed, or consideration as to the adequacy of previous coverage and the appropriateness of particular spokesmen, will inevitably result in unfair and artificial exposure of some issues and some viewpoints.

An even greater threat to broadcasters' journalistic independence is the resultant intrusion of the FCC into day-to-day station and network operations. There can be no doubt that, from the initial setting of "reasonable regulatory guidelines" to implement the lower court's directive [87], the Commission would increasingly be called upon to rule on such matters as (1) what issues are to be covered; (2) what viewpoints on given issues require more or less attention; (3) what persons or groups are to be allowed to express their views; (4) what viewpoints par-

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[86] App. 490-91. At present, because the licensee is cognizant that he may have to present opposing viewpoints free of charge, *Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963), he is able to take this into account in planning coverage. However, under the right articulated by the court of appeals, the *Cullman* principle is invoked at the initiative of the spot advertiser. In this scheme, it is possible for the advertiser's financial resources to determine "what issues are to be aired", with the broadcaster required to make free time available to permit a fair presentation of the issues. See concurring statement of Commissioner Cox in *BEM*, App. 368. Finally, any suggestion that the *Cullman* principle or the fairness doctrine be suspended in these circumstances (see Commissioner Johnson dissent, App. 281) could result in the public being left uninformed.

[87] App. 488.

ticular groups or spokesmen actually represent; and (5) what, if any, time limit should apply. Disputes over the exercise of the newly articulated right will be inevitable and prolific, thrusting the Commission—and likely the courts as well—further and more profoundly into the area of program judgments of news and editorial material.[88]

Significantly, any refusal by a licensee to broadcast a given editorial announcement will generate the contention that such refusal constitutes an infringement of the applicant's right of free speech. Thus, irrespective of the manner and form of any resulting Commission "guidelines", the First Amendment ground on which the court of appeals decision is based presumably dictates that a reason be given for any licensee refusal. Thereupon, the Commission will be placed in the position of arbitrating the basis for any such refusal by measuring the licensee's reason for declining to broadcast certain announcements against the applicable guideline. As a consequence, the lower court decision will result in increased and undesirable government supervision of licensee day-to-day programming judgments.[89]

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[88] This would be directly counter to the Commission's long maintained policy of specifically avoiding any intrusion "in the news or editorial decision processes of licensees, because such intrusion by the government licensing agency might have a chilling effect on journalistic enterprise." *In re Fairness Complaint of Sidney Willens and Russell Millin*, 33 F.C.C. 2d 304, 309 (1972). See also *In re Mrs. J. R. Paul*, 26 F.C.C. 2d 591 (1969); *Letter to ABC, CBS and NBC*, 16 F.C.C. 2d 650 (1969); *New York City Health and Hospitals Corp.*, 32 F.C.C. 2d 299 (1971); *In re "The Selling of the Pentagon"*, 30 F.C.C. 2d 150, 152-53 (1971).

[89] Were the Commission to assume the responsibility to designate the issues or the spokesmen to be presented during broadcast advertising time, it would run a grave danger of violating the strictures of Section 326 of the Communications Act, 47 U.S.C. § 326. Like the refusal of Congress to require broadcasters to afford an individual right of access (see pp. 36-43, *supra.*), Section 326 reflects a firm Congressional intention to place the choice of programming in the hands of broadcast licensees. That section not only

In sum, such an intrusion on the broadcaster's ultimate responsibility to select and transmit program material [90] operates in a dual inhibitory fashion—it directly affects program judgments as to the material proffered by an "editorial advertiser" in a spot announcement context and indirectly influences programming decisions in other areas. A significant modification in one area of programming could well induce changes in other areas. For instance, assuming that the Constitutional basis for the lower court decision would not permit any rejections

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forbids any censorship of broadcast programming, but provides that the Commission should not set any regulations which would interfere with free speech in radio communication. Neither censorship in the classical sense—suppression of individual publications on the ground that their content is objectionable—nor establishment by the Commission of a scale of values which would govern the selection of individual programs was thought to be within the power conferred by this section. See 67 CONG. REC. 12356 (1926); SEN. REP. No. 772, 69th Cong., 1st Sess. 4 (1926).

[90] As we have shown, proceeding from the assumption that subjects to be covered and speakers to be heard must be determined by someone, a cardinal principle of broadcasting operations under the Communications Act has been that a licensee bears ultimate responsibility for all material broadcast over his facilities. See, *e.g.*, 47 U.S.C. § 310(b); *Pulitzer Pub. Co.* v. *FCC*, 94 F.2d 249, 251 (D.C. Cir. 1937); *Regents of New Mexico* v. *Albuquerque Broadcasting Co.*, 158 F.2d 900, 905-06 (10th Cir. 1947). The only exception to this general policy are broadcasts by candidates for public office where the licensee is forbidden to censor programming in which the candidate appears. 47 U.S.C. § 315(a). In a different sense, one legislative provision (47 U.S.C. § 315(a)) and two administrative regulations (the "personal attack" and "political editorializing" rules approved in *Red Lion*) circumscribe, in limited situations a licensee's responsive programming determinations. Thus, individuals subject to personal attacks have been designated the appropriate spokesmen for delivering replies and opposing political candidates have been predesignated as appropriate reply spokesmen to answer political editorials. In each instance, however, the licensee is initially responsible for the broadcast generating the reply obligation. Finally, while Section 315(a) requires that "equal opportunities" be extended opponents of a qualified candidate, the provision expressly states that "no obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate."

of proffered announcements on grounds of previous or intended coverage of the issues,[91] a heavy concentration of announcements on an issue such as the nation's economic health could cause a broadcaster seeking to maintain a semblance of balanced treatment to forego certain program selections in order to prepare and present material directly responsive to the repeated position expressed in the saturated announcement schedule.

A basic error of the court of appeals opinion—an error which bears directly upon the reasonableness of licensee discretion in determining whether to accept or to reject controversial issue announcements—is the assumption that time devoted to commercial announcements is merely a segment of the broadcast day "relinquished by broadcasters to others" and that it is not "closely controlled and edited by broadcasters", so that "all that is at issue is their decision as to which other parties will be given an opportunity to speak." [92] Elsewhere the court asserts that this is "an area in which editorial control over content has never been of major importance." [93]

This assumption is clearly erroneous. In screening commercial announcements for which broadcast time is sought, licensees exercise control over not only the "time, place and manner of speech" and other housekeeping functions referred to in the court's opinion,[94] but also substantive content. Thus, broadcast licensees, as part of their "public interest" performance, review proferred material to screen out false, misleading and deceptive

[91] The reasoning of the court of appeals clearly appears to suggest that it would be impermissible to refuse to sell advertising time on the ground that a similar viewpoint has already been adequately presented (App. 471-73) or on the ground that the matter is unimportant and that other issues are more deserving of coverage (App. 469).

[92] App. 464-65.

[93] App. 483.

[94] *Ibid.*

advertisements, libelous statements, promotions of lotteries and other illegal activities, obscene, profane and indecent expressions, and other forms of speech found objectionable or questionable under federal statute, state law, FCC and Federal Trade Commission policy, and industry and licensee standards of good practice and taste.[95] Licensees must also concern themselves with the "reliability and reputation of every prospective advertiser and . . . his ability to fulfill promises made to the public over the licensed facilities." [96]

The constitutional underpinning of the lower court decision, however, casts grave doubt on the question of whether the Commission or its licensees may develop substantive standards of these kinds to control the entry of editorial announcements, so as to prevent misleading, scandalous, indecent and "crackpot" statements on social or political issues.[97] The lower court recognized that a "discrimination against all controversial speech—such as we face in these cases—is somewhat less 'odious' than a discrimination among different controversial viewpoints on particular issues." [98] But the court ignored the fact

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[95] See *Center for Law and Social Policy*, 23 Pike and Fischer, Radio Regulation 187, 192-97 (1971); *Adoption of Standards Designed to Eliminate Deceptive Advertising From Television*, 23 Pike and Fischer, Radio Regulation 1550, 1560-65 (1971).

[96] *Center for Law and Social Policy, supra*, 23 Pike and Fischer, Radio Regulation at 193.

[97] The court of appeals itself relied upon the difference between "commercial" and "political" speech so far as the permissibility of content regulation is concerned (See, *e.g.*, App. 473 and n.38); but, as we have shown, it ignores the fact that broadcasters actually do regulate the subject matter of commercial announcements and may be called upon to act differently with respect to editorial announcements. For instance, in one of many ironies engendered by the court of appeals decision, the First Amendment ground of the opinion would presumably not permit a licensee to reject a brief 10-second announcement that is mere "sloganeering" on the basis that only a longer presentation on the complex issue would contribute to the public's right to be informed.

[98] App. 478.

that broadcasters will either have to make discriminatory judgments on the suitability of particular announcements for audiences of all ages and sensibilities, or permit what, in the eyes of the public generally, would be a clear debasement of the broadcast media by speech more appropriately expressed in other places.[99]

It is an unacceptable choice which should convincingly demonstrate that neither the First Amendment nor common sense compels a right of personal access for editorial announcements on all broadcast stations.[100] Indeed, the First Amendment interests of the public as a whole would be disserved by such a development. Rather than enhancing, it would be contrary to First Amendment interests, and a severe if not impossible administrative burden, if broadcasters were compelled to engage in the delicate balancing of constitutional and other interests concerning the acceptability of inflammatory, hateful,

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[99] A public place need be opened for First Amendment-protected expression only to the extent that the speech is presented "in a manner and for a purpose generally consonant with the use to which the property is actually put." *Amalgamated Food Employees Local Union 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 319-29 (1968).

[100] As we have shown, "differences in the characteristics of news media justify differences in the First Amendment standards applied to them." *Red Lion, supra*, 395 U.S. at 386, 388. The court of appeals opinion recognizes no distinguishing characteristics of the broadcast media in this sense, and applies the strictest First Amendment tests, including the "clear and present danger" doctrine. App. 475. It is somewhat disconcerting that the lower court decision should end with a reference to *Terminiello* v. *Chicago*, 337 U.S. 1 (1949), if that is meant as an example of the kind of speech which must be broadcast in spot announcement form to citywide or nationwide captive audiences. The speech there in question, as detailed in Mr. Justice Jackson's dissenting opinion (337 U.S. at 13), involved an inflammatory anti-Semitic harrangue. Distinguishing features of that case are that the speech occurred at an auditorium at which sympathizers gathered inside and a disorderly protesting mob gathered outside; the majority of the Court held, in a 5-4 decision, that the situation could not justify conviction of the scheduled speaker for breach of the peace.

"frivolous" and other questionable expressions of opinion by all persons offering to pay for broadcast time.

As a "public trustee" the broadcast licensee has the obligation to select "appropriate spokesmen" to voice "significant" viewpoints on issues of "public importance". But, in implementing the kind of right of access proclaimed by the court of appeals, it is not likely that licensees would be permitted to limit access to "significant" views on important subjects. Ironically, the concept of licensee responsibility so fundamental to the system chosen by Congress and the Commission, and upheld by this Court in *Red Lion*, not only prompts the court below to find constitutional infirmities in the existing regulatory scheme,[101] but is the very component at least partially removed from the new constitutional scheme set in motion.[102]

As we have elsewhere shown, Congress, the Commission and the courts have determined that the central goal of the First Amendment as it applies to broadcasting is to enhance the right of the public to be informed. In these particular cases, the Commission, based on decades of experience in interpreting the statutory public interest standard and administering the fairness doctrine based thereon, carefully articulated the practical and legal basis for such policies and concluded that the pub-

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[101] According to the court of appeals, the present system is constitutionally inadequate because it allows broadcasters to "decide what issues are 'important,' how 'fully' to cover them, and the format, time and style of the coverage." (App. 469).

[102] For instance, the court found that the First Amendment interest in self-expression it had formulated could only be vindicated by putting the "crucial controls" for the use of some advertising time in the hands of outside individuals or groups. App. 468-69. Thus, even if broadcasters demonstrate a full exposition of viewpoints and partisan spokesmen during non-advertising time, "their retention of total initiative and editorial control is inimical to the First Amendment." App. 469. See also App. 485.

lic's interest in broadcasting would be best served by declining to compel stations to sell time for the presentation of individual views.[103] Moreover, as the administrative agency entrusted with the task of developing workable policies to govern the allocation and utilization of broadcast frequencies, the Commission is continuing to examine what further adjustments and changes are desirable or possible in fulfilling the spirit of the fairness doctrine.[104] Thus, if deficiencies in the public's First Amendment right to be informed are perceived, they can and should more appropriately be handled through administrative procedures before the Commission which look toward modifications in the existing system and take into account the full complement of related broadcast policies.

In contrast, the lower court's objective of removing from broadcast licensees and allocating to affluent individuals and groups discretion in some program content selection represents a glaring aberration of the total scheme of broadcast regulation. As we have seen, in a limited-time medium, the paramount right of the public to be informed cannot be meaningfully served by a common-carrier approach in which views and spokesmen are presented on a first-come, first-served basis. Accordingly, Congress and the Commission have determined to treat broadcast licensees as trustees for the public at large with the concomitant responsibility to select the issues and spokesmen to be broadcast. The lower court charts a dramatic departure in attempting to reformulate this system in a manner which diffuses responsibility for

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[103] App. 256-69; 366-68.

[104] See *In re Notice of Inquiry and Notice of Proposed Rule Making in Docket No. 18859*, 23 F.C.C. 2d 27 (1970); *In re Notice of Inquiry in Docket No. 19260*, 30 F.C.C. 2d 26 (1971). The latter proceeding, which incorporates the former, is a comprehensive review of all aspects of the fairness doctrine and is intended to thoroughly explore, *inter alia*, the question of access generally to the broadcast media for the discussion of public issues.

program content to individuals and groups who bear neither a journalistic responsibility nor a statutory obligation to serve the public. Consequently, the new regime which is proposed would seriously compromise the vital First Amendment interests at stake by frustrating the ability of radio and television stations to program for the public at large and by leading to increased governmental supervision of broadcast speech.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-863

COLUMBIA BROADCASTING SYSTEM, INC.,
Petitioner,

v.

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,
Respondents.

No. 71-864

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Petitioners,

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, *et al.*,
Respondents.

No. 71-865

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
Petitioner,

v.

BUSINESS EXECUTIVES MOVE FOR VIETNAM PEACE, *et al.*,
Respondents.

No. 71-866

AMERICAN BROADCASTING COMPANIES, INC.,
Petitioner,

v.

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF NATIONAL BROADCASTING COMPANY, INC., AS *AMICUS CURIAE*

This brief is submitted on behalf of National Broadcasting Company, Inc. ("NBC"), as *amicus curiae,* in support of the position of petitioners in these actions seeking reversal of judgments of the United States Court of Appeals for the District of Columbia Circuit entered on August 3, 1971.

Opinions Below

The opinion of the Court of Appeals is reported at 450 F.2d 642 (D.C. Cir. 1971). Opinions of the Federal Communications Commission reversed by the Court of Appeals are reported at 25 F.C.C.2d 216 (1970) and 25 F.C.C.2d 242 (1970).

Jurisdiction

Judgments of the Court of Appeals were entered on August 3, 1971 and reissued on October 29, 1971. The petition of the United States of America and the Federal Communications Commission for a writ of *certiorari* in *FCC* v. *Business Executives' Move for Vietnam Peace* (hereafter *BEM*) and *FCC* v. *Democratic National Committee* (hereafter *DNC*) was filed on January 3, 1972; the petition of intervenors American Broadcasting Companies, Inc., and Columbia Broadcasting System, Inc. for writs of *certiorari* in *DNC* were filed on January 3, 1972; and the petition of Post-Newsweek Stations, Capital Area, Inc. for a writ of *certiorari* in *BEM* was filed on January 3, 1972. All the petitions for *certiorari* were granted on February 28, 1972 and the cases consolidated for hearing by this Court. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Consent of the Parties

All the parties to the proceedings below have given their consent to the filing of this brief and their letters of consent are on file with the clerk of this Court.

Question Considered in This Brief

Whether, consistently with the First Amendment, the government may compel a broadcast licensee which has complied with the fairness doctrine to sell editorial advertising time to a party seeking to purchase such time.

Constitutional Provision

The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Interest of the *Amicus*

NBC was prepared, in the exercise of its discretion (A. 47),* to sell time to the Democratic National Committee.** It was thus not a party to the *DNC* case. Nor was it involved in the *BEM* action. NBC played no role in these proceedings until the opinion of the Court of Appeals was rendered. It is that opinion, couched as it is in terms of

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* References to "A. ——" are to the relevant pages of the Appendix before this Court.

** After advising the Democratic National Committee that NBC would make available for purchase by it of a prime time period on the NBC Television Network, NBC was advised that the Democratic National Committee did not wish to proceed with the purchase of time. (A. 47)

a supposed constitutional *requirement* that speakers have personal access to advertise on television, that occasions the submission of this brief. In our view, that which the majority of the Court of Appeals referred to as the "modest reform" effected by its opinion (A. 482) is nothing less than a most immodest incursion into the First Amendment.

Statement

NBC adopts as its Statement the material set forth in the equivalent section of the brief of the United States of America and the Federal Communications Commission.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO THE FIRST AMENDMENT.

Introduction

The BEM decision is, in our view, incorrect and insupportable on a variety of grounds, any one of which would suffice to warrant reversal. The validity of the decision is, for example, totally dependent upon what we believe to be its extravagantly broad reading of the concept of "state action" by which broadcast stations are transformed into the equivalent of state owned and operated stations. Disagreement by this Court with the Court of Appeals as to this issue—as argued at length in the persuasive briefs submitted by petitioners in 71-863, 71-865 and 71-866,*—would itself lead to reversal.

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* We deal with the issue briefly, *infra*, pp. 15-17, in our discussion of the inapplicability of *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) to the instant action.

Similarly, disagreement by this Court—as urged by the United States and the FCC in 71-864—with the unwillingness of the Court of Appeals to grant any deference in this case to the administrative expertise of the FCC should also lead to reversal.

In this brief, we focus on the constitutional analysis of the Court of Appeals which we believe to be basically at odds with the First Amendment.

Television as Press

This case involves fundamentals and we start with the fundamental position that broadcasting is part of the press protected by the First Amendment. This Court has so held, *United States* v. *Paramount Pictures,* 334 U.S. 131, 166 (1948), and it is now difficult to imagine a contrary holding.* Thus, in the libel area, the line of cases commencing with *New York Times* v. *Sullivan,* 376 U.S. 254 (1964) has been applied with equal vigor to cases involving broadcasting. *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29 (1971); *St. Amant* v. *Thompson,* 390 U.S. 727 (1968). And in the cases currently pending before this Court relating to the First Amendment right of journalists not to disclose their confidential sources, none of the courts below, nor counsel, has suggested that any different result could properly flow from the fact that one of the cases now pending (*In the Matter of Pappas,* 266 N.E.2d 297 (Mass.), *cert. granted,* 402 U.S. 942 (1971)), involves

* Many years have passed since the Federal Radio Commission contended in court that broadcasting, since it involved electronic reproduction of speech, was not itself protected under the First Amendment. See, Brief of Commission in *Trinity Methodist Church South* v. *Federal Radio Commission,* 62 F.2d 850 (D.C. Cir. 1932) at pp. 47-49. Such arguments are not now to be heard from the FCC. What is striking is that arguments to that end are now proferred by respondents—all, we are told, in the name and spirit of the First Amendment.

a television newsman, while the other two involve journalists employed by newspapers (*United States* v. *Caldwell*, 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971) and *Branzburg* v. *Hayes*, 461 S.W. 2d 345 (Ky. 1970), *cert. granted*, 402 U.S. 942 (1971).

That television should receive essentially similar First Amendment protection as newspapers arises from the fact that both perform similar First Amendment functions. Senator Ervin, at the opening of recent hearings of the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, aptly observed that:

> "While the Founding Fathers did not contemplate the media of a radio and television when they wrote the First Amendment, their reasons for protecting the printed press from Government control apply equally to the broadcast media . . . If First Amendment principles are held not to apply to the broadcast media, it may well be that the Constitution's guarantee of a free press is on its death bed . . ." (Hearings, Subcomm. on Constitutional Rights of the Senate Judiciary Comm., 92nd Cong., 2d Sess. —— (1972).

NBC News correspondent Bill Monroe put the issue succinctly in his recent testimony before the Ervin Subcommittee. Mr. Monroe, comparing the print press and the broadcast media, observed:

> "The fantastic new technology and sudden impact of television may have misled us about its most vital function. Seeking to fit it into familiar categories, some of us have been impressed with the size and wealth of television, and have put it down as big business. Some of us have been impressed with its evening parade of singers, dancers, actors and comedians, and have put it down as the new vaudeville. But those

nervous pictures that bring the White House, Capitol Hill, Vietnam and London into our living rooms don't strike us immediately as the new front page. So we have missed the main fact about television: it *is* press. And if television and radio spend more time on entertainment and commercials than on news, so, in fact, do many newspapers with their acres of advertising, their sports pages, gossips, astrologists, advice to the loveless and fat Sunday editions with the news tucked inside the colors of Dick Tracy and Peanuts. Radio and television are, at bottom, instantaneous, warm-blooded press. Like the printed press, they carry the flesh of commerce and entertainment on a hard skeleton of news. And, like the printed press, they *are* massively engaged in exactly that kind of communication which the First Amendment was written to protect." (Emphasis in original.) (*Id.* at ——.)

The Nature of a Free Press

The First Amendment was drafted to protect the public from what human experience teaches will be the likely result of the power of *government* over speech and press. Fear of government prompted those who desired a Bill of Rights to insist upon its incorporation with the Constitution.* The same concern led Madison, draftsman of the Bill of Rights, to observe in the debates in the House over its

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* Jefferson, who would have opposed ratification of the Constitution without the addition of a Bill of Rights, wrote from Paris to Madison during the debates over ratification of the Constitution, that:

> "A bill of rights is what the people are entitled to against every government on earth, general or particular [that is, Federal or state], and what no just government should refuse, or rest on inferences." IV P. L. FORD, *Writings of T. Jefferson* 477 (1904).

See, *e.g.*, *O'Neil* v. *Vermont*, 144 U.S. 323, 370 (1892) (Harlan, J., dissenting).

adoption, that its purpose was to guard against the possibility of "abuse of powers of the General Government". For this reason, Madison stated, "the liberty of the press [was] expressly declared to be beyond the reach *of this Government.*" 1 ANNALS OF CONGRESS 432, 737 (1834). (Emphasis added.)

Press was thus intended to be independent of government and, indeed, to serve not merely as a conduit of information or views, but a critic and gadfly, especially of government. This role of the press was well defined by this Court in *New York Times* v. *Sullivan, supra,* by reference to Madison's report on the Virginia Resolutions:

> "Earlier, in a debate in the House of Representatives, Madison had said: 'If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.' 4 Annals of Congress, p. 934 (1794). Of the exercise of that power by the press, his Report said: 'In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands . . . .' 4 Elliot's Debates, *supra,* p. 570 . . . ." (376 U.S. at 275)

This Court has thus condemned over the years, not merely governmental action overtly suppressing the expression by the press of particular views, but the subtlest of governmental influences which might mute the press in the slightest degree or discourage it, even minimally, from performing its role. "Freedoms such as [speech, free press] are protected not only against heavy-handed frontal

attack, but also from being stifled by more subtle governmental interference." *Bates* v. *Little Rock*, 361 U.S. 516, 523 (1960). See, *e.g.*, *Mills* v. *Alabama*, 384 U.S. 216 (1966); *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936).

The essential teaching of the First Amendment is that it is in the public interest that the press be free. As Reuven Frank, NBC News president, has observed:

> "Of course, the free press, we will be told, but a free press means a responsible press, a constructive press, a patriotic press, an even-handed press, a restrained press—all the noble words used to describe the press in the official utterances and even the constitutions of every dictatorship in the world, of right or left. A free press, they will tell us, is a press which deserves to be free. That is what President Nyerere said when he fired the editor of the *Dar es Salaam Standard;* that is what Prime Minister Lee Kuan Yew said when he shut down the *Singapore Herald.* But 200 years ago Americans knew that it was not that the press deserved to be free, but that the people could not be free unless the press were free." (Speech of Reuven Frank, November 11, 1971, quoted in Abrams, *The People's Right to Know: The Legal Maze*, 8 TRIAL 20, 31 (1972))

What was guaranteed by the First Amendment, then, was a press free enough to decide for itself what to print. The *BEM* decision is to the contrary. The decision inexorably places the government—through the FCC and the courts—at the heart of the decision making process as to *which* editorial advertisements shall be broadcast. Unless time to telecast editorial advertisements must now be sold (as Commissioner Johnson has proposed)* on a first-come, first-serve basis—thus placing a premium on the speed with

* A. 281.

which the affluent rush to set the agenda for public debate* —ultimately the decision as to which advertisement will be telecast will have to be based upon the exercise of judgment. The question, of course, is whose judgment. To the extent government is placed in a position of overseeing, of ruling on the exercise by broadcasters of their judgment and, indeed, of second-guessing that judgment, its role could not help but be central to the decision making process. That this would be the result of *BEM* is evident from Judge Wright's decision itself which indicates that the Commission is apparently now to issue "reasonable regulations" (A. 483-84) relating to the amount and placement of editorial advertisements (A. 484); to prevent "domination by a few groups or a few viewpoints" (A. 485); and the like. Apart from these decisions, who is now, after *BEM*, to decide whether advertisements may be rejected because of poor technical quality, or because they are or border on the obscene or, indeed because they are beyond the bounds of normally accepted taste? Who is to decide whether criticism of the government itself on one or more issues has been adequately presented? In short, is the decision maker to be the broadcast licensee or—on review—the government?

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* The Commission observed in its *BEM* decision that:

"Further, the public's agenda for discussion of public issues would then be set substantively and increasingly by the affluent —by the person or group which '. . . has the financial resources and interest to purchase sustained access to the mass communications media . . .' (*Banzhaf* v. *F.C.C.*, 405 F.2d 1082 (C.A.D.C. 1968), *cert. den.*, 396 U.S. 842). Since the amount of broadcast time for discussion of controversial issues is limited and since the licensee must afford reasonable opportunity for discussion of both sides, the purchase of substantial blocks of time for a campaign by, say, the oil industry to discuss the issue of the oil depletion allowance would impose the burden to present reasonably the other viewpoint, and in turn would inevitably cut down on the amount of time for discussion of other issues." (A. 17)

BEM, we submit, places the government in the ultimate decision-making role as to each such issue.

Whatever the issue, "reasonableness" after *BEM* is inevitably to be determined by one branch of government—the Commission—with appeals taken to another branch—the courts—to determine if the Commission's action in this area is itself reasonable. All this is to be done by the government, all, we are told, to vindicate interests set forth in the same First Amendment that Madison drafted to place "the liberty of the press . . . beyond the reach of this Government." 1 ANNALS OF CONGRESS 737 (1834). It is to be done by the same government that Justice Brandeis warned against in his observation that "experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent." *Olmstead* v. *United States*, 277 U.S. 438, 479 (1928) (dissenting opinion)

The risk of the exercise by government of the powers thrust upon it by the *BEM* decision is neither speculative nor uncertain. The FCC has itself recognized the inconsistency of *BEM* with the First Amendment, observing in its petition for reconsideration of the decision of the Court of Appeals that:

> ". . . it is important to note that the Commission is the Government. It has been careful to tailor its actions in the fairness and related fields so as not to become in effect the broadcast journalist or programmer. Such inappropriate supervision by the Commission would clearly stifle 'uninhibited, robust, and wide-open' debate, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), and be contrary to the First Amendment. But that is what the Court has invited as a consequence of its approach. How is the Commission, the Government, to review licensees' actions refusing

> *some* requests on grounds that, for example, the viewpoint sought to be expressed is not only similar to that already afforded advertising time, but that too much time has already been allotted this particular narrow viewpoint (assuming *arguendo* that a refusal on this ground is permissible under the First Amendment)? We believe that whether reviewing particular actions or formulating general guidelines, this is precisely the kind of quagmire which the Government must avoid." (Brief of FCC re petition for consideration, pp. 8-9)

Both opponents and supporters of the *BEM* decision have remarked upon its incompatability with bedrock First Amendment theory. Thus, Clay T. Whitehead, Director of the Office of Telecommunications Policy of the Executive Office of the President, recently observed that "When the faulty logic of the *BEM* case is exposed, all that remains is the effort to control content in broadcasting because it is an important and effective communications medium, and this effort, the Constitution forbids." (Address by Clay T. Whitehead, April 10, 1972)

A sympathetic student observer of the *BEM* decision, recognizing its inconsistency with long-established First Amendment law, has observed that problems with the ruling

> ". . . could be avoided by relaxing to a limited extent the constitutional principles against content discrimination and regulatory discretion. This limited relaxation seems warranted where, as here, speech is being regulated to advance first amendment interests rather than to balance other valid governmental regulatory interests against those of the first amendment. More would be lost by curtailing the government in its attempt to advance first amendment interests than would

> be risked by developing standards for selection of which advertorials to air." (85 HARV. L. REV. 689, 697-98 (1972))

Simply put, we submit that the "constitutional principles" involved are too significant to be subjected to such "relaxation."

Given the restrictions inherent in the First Amendment in government activities in this area, it is hardly surprising that when the identical issue posed by this case has arisen with respect to privately owned newspapers, courts have been virtually unanimous in holding that advertisements may be declined in the judgment of the newspapers involved. In the leading recent case of *Associates & Aldrich Co.* v. *Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971), the Court of Appeals for the Ninth Circuit, observing that government and press had a "history of disassociation", 440 F.2d at 136, responded to the contention that a newspaper was obliged to accept an advertisement against its will as follows:

> "Appellant has not convinced us that the courts or any other governmental agency should dictate the contents of a newspaper.
>
> "There is no difference between compelling publication of material that the newspaper wishes not to print and prohibiting a newspaper from printing news or other material." (440 F.2d at 135)

Among other cases so holding, see, *Chicago Joint Board* v. *Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 29 L.Ed.2d 138 (1971); *Resident Participation of Denver, Inc.* v. *Love*, 322 F.Supp. 1100 (D. Colo. 1971) (three-judge court); *Jewish Defense League* v. *New York Times*, —— F.Supp. —— (S.D.N.Y. 1971); *Bloss* v. *Fed-*

erated Publications, Inc., 5 Mich.App. 74, 145 N.W.2d 800 (1966); *Lord* v. *Winchester Star, Inc.*, 346 Mass. 764, 190 N.E.2d 875 (1963); *cert. denied*, 376 U.S. 221 (1964); *Commonwealth* v. *Boston Transcript Company*, 249 Mass. 477, 144 N.E. 400 (1924); *Shuck* v. *Carroll Daily Herald*, 215 Iowa 1276, 247 N.W. 813 (1933); *Mack* v. *Costello*, 32 S.D. 511, 143 N.W. 950 (1913); *Approved Personnel, Inc.* v. *Tribune Co.*, 177 So.2d 704 (Fla. Ct. App. 1965); *Friedenberg* v. *Times Publishing Co.*, 170 La. 3, 127 So. 345 (1930); *In re Louis Wohl, Inc.*, 50 F.2d 254 (E.D. Mich. 1931); *Poughkeepsie Buying Service, Inc.* v. *Poughkeepsie Newspapers, Inc.*, 205 Misc. 982, 131 N.Y.S.2d 515 (Sup. Ct. Orange Co. 1954).*

To all this, we are met with the argument that broadcasting is so different from newspapers that a different First Amendment result is dictated. We are further told that *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) supports and indeed compels this conclusion. We disagree.

The Red Lion Decision

Of course, in *Red Lion* this Court upheld the constitutionality of the personal attack and political candidate editorial requirements of the fairness doctrine as then embodied by Congress in Section 315 of the Communications Act (47 U.S.C. § 315). In doing so, the Court—over the objections of NBC and other broadcast licensees—held

* The only case of which we are aware to the contrary is *Uhlman* v. *Sherman*, 22 Ohio N.P. (n.s.) 225, 31 Ohio Dec. 54 (1919). That decision was later rejected as persuasive authority in Ohio in the case of *Sky High Theater, Inc.* v. *Gaumer Publishing Co.* (unreported, No. 228220), cited in *Bloss* v. *Federated Publications, supra*, at 804. The *Uhlman* decision has also been aptly characterized as the single "exception" to the rule that "has been uniformly held" that a private publisher is under no legal obligation to sell advertising to those who apply for it. Annot., "Right of Publisher, Newspaper or Magazine to Refuse Advertisement", 87 A.L.R. 97 (1933).

that the nature of the First Amendment protections applicable to broadcasting was somewhat different than that available to the privately owned print press. Basing its decision upon the limited amount of frequencies available for use and the government licensing power over broadcasters, the Court held that some government regulation of what broadcasters must present as a *direct* consequence of what they initially broadcast was proper so as to insure that persons attacked be given the opportunity to respond.

Differences between this case and *Red Lion* are vast. In *Red Lion* this Court did not pass upon the constitutionality of any action, such as in the present case, which could deprive broadcasters of the right to determine in the first instance which issues and points of view should be broadcast. Further, in its *Red Lion* opinion, the Court—answering the argument of broadcast licensees that the personal attack rule could lead to content control by government—indicated that "more serious First Amendment issues" might be raised in situations in which the government played a more significant role with respect to program content. (395 U.S. at 396) That, of course, is precisely the present case.

For all its import, *Red Lion* merely held constitutionally permissible under the First Amendment an FCC Rule embodied in an act of Congress. This Court did not hold that a fairness doctrine was constitutionally compelled. Nor did it suggest that the FCC would have acted unconstitutionally by issuing rules other than those upheld in *Red Lion*. The contention that *Red Lion* in any manner requires a result such as that reached in *BEM* is simply unsupportable.

Nor does *Red Lion* lend any support to the distinction offered by the Court of Appeals of this case from those involving privately owned newspapers. The Court of

Appeals' contention that acts of broadcast licensees unlike those of privately owned newspapers are, in effect, "state action" is unpersuasive, as well as being contrary to extensive precedent. Such a holding, which analogizes broadcast licensees to government-owned television stations, must certainly come with surprise to those government officials who have criticized television stations for their coverage of national events. It is contrary in theory to the *Times-Mirror, Chicago-Tribune* cases and the like which hold—with substantial historical support—that the function of the press has historically been that of critic and watch-dog of government. It is also contrary to the specific holdings of cases such as *McIntire* v. *Wm. Penn Broadcasting Co. of Philadelphia,* 151 F.2d 597 (3d Cir. 1945), *cert. denied,* 327 U.S. 779 (1946). That case involved a federal action by a clergyman whose broadcasting contracts had been broken by defendant's radio station. The court affirmed the dismissal of the complaint on the ground that it failed to state a federal cause of action, stating that:

> "The First Amendment was intended to operate as a limitation to the actions of Congress and of the federal government. The defendant is not an instrumentality of the federal government but a privately owned corporation." (151 F.2d at 601)

Accord, *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.,* 183 F.2d 497 (1st Cir. 1950); *Post* v. *Payton,* 323 F.Supp. 799 (E.D.N.Y. 1971).* Cases such as these

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* In *Post* v. *Payton, supra,* responding to the argument that *Red Lion* established the proposition that action of a broadcast licensee constituted "governmental action" the Court observed:

> "Plaintiffs' reliance upon Red Lion Broadcasting Co., Inc. v. Federal Communications Commission, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969), is misplaced. In that case the Supreme Court did not hold that the licensee's actions were

are now dismissed by the Court of Appeals as "doctrinal impedimenta" cleared away by *Red Lion*. (A. 456) In fact, *Red Lion* addressed itself to nothing of the sort. It did not deal with the concept of state action; it did not hold that television stations are instrumentalities of the federal government; least of all did it purport to reverse, *sub silento, McIntire, Hildreth* and the numerous cases holding it constitutional for the press to decline, in its discretion, to publish advertisements.*

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governmental action. It merely ruled that a broadcast licensee's First Amendment rights were not abridged by Congress or the Commission by the application of the latter's 'fairness doctrine' or the regulations and orders promulgated thereunder." (323 F.Supp. at 803)

And that:

"Here the broadcast licensee is a private entity, acting neither in behalf of, nor as agents for, the Federal government, nor is the licensee performing a governmental function, such as delivery of the mails. The Government is not charged with the duty of broadcasting or formulating the program of any particular radio station. In fact, the Communications Act of 1934 exclusively reserves station programming to the licensee, free of any censorship by the Commission. 47 U.S.C. § 326; McIntire v. Wm. Penn Broadcasting Co. of Philadelphia, *supra*; Massachussetts Universalist Convention v. Hildreth & Rogers Co., *supra*. It is only governmental action which can violate the First and Fourteenth Amendments, as held, for example, in The Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883). To hold that the licensing by the Federal Government of a broadcast frequency endows the recipient with the quality of an agency of the Federal Government would be an unreasonable interpretation of governmental action." (*Id.* at 803-04)

* The submission of the Court of Appeals that actions of broadcast licensees are in effect "state action" is also both tautological and circular. As Clay T. Whitehead, Director of the Office of Telecommunications Policy of the Executive Office of the President, recently observed:

"The *BEM* tautology is that, in the past, something unique about broadcasting justified extensive government involvement, now the extent of government involvement is the thing

Red Lion also lends no support to the basic thrust of the opinion below that it is unconstitutional for television stations to have a policy against the acceptance of all editorial advertisements because of the "most important" First Amendment value of "individual self-fulfillment through expression."* (A. 467) Whatever may be the psychotherapeutic rewards of self-fulfillment, they have little to do with the First Amendment. The core purpose of the First Amendment, after all, is not that of soothing the ruffled ego of a speaker unable to find a forum to his liking. Benjamin Franklin is reported to have said that his newspaper was not a stagecoach with seats for everyone. F.L. MOTT, AMERICAN JOURNALISM 55 (3d ed. 1962) Neither *Red Lion* nor the First Amendment says anything to the contrary.

The opinion of the Court of Appeals is one which by misreading the First Amendment ultimately undervalues

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that makes broadcasting unique. This kind of logic is specious and cannot support unique treatment for broadcasting under the Constitution." (Address of Clay T. Whitehead, *supra*, p. 12)

* The other First Amendment interests referred to by the Court of Appeals are already fully protected—to the extent protection is required—by the fairness doctrine and the administrative processes. The right of the public to "suitable access to social, political, esthetic, moral and other ideas and expressions" (A. 465) is itself the basis upon which *Red Lion* sustained the challenged constitutionality of the personal attack and political editorial aspects of the fairness doctrine. See 395 U.S. at 390. The interest of the public in "uninhibited" debate (A. 466) is also referred to in *Red Lion* but it cannot be postulated that the public is not now receiving such debate. There was no evidence before the Court of Appeals—and there is no evidence before this Court—on the basis of which a factual finding could properly have been premised and, indeed, there is a good deal of evidence precisely to the contrary. (See, *e.g.*, A. 67-154. See also, *infra*, pp. 20-21 of this brief.) Additionally, we respectfully submit that decisions such as these are, at least in the first instance, properly made only by the Commission and not the courts.

it. After all its discussion of the constitutional rights of individuals to appear on television, the Court of Appeals concludes that this "right" of the public is "abridgeable", since it must be subject to inherent limitations of time actually available for sale on television. It is also abridgeable, in the view of the Court of Appeals, in that the "right" of access involved is apparently only to be given effect if the broadcaster carries commercial advertising.* (A. 467, 474-477) By this reasoning, non-commercial educational television stations would presumably be exempt, as would any privately owned station that accepts no commercial advertisements. It is surely an odd First Amendment right that in its very definition is deemed so easily subject to abridgement. The First Amendment, when correctly interpreted, has historically meant more.

The decision of the Court of Appeals is inconsistent with *Red Lion* in still another fashion. In *Red Lion*, the Court upheld the constitutionality of the personal attack requirement of the fairness doctrine as then embodied in § 315 of the Communications Act (47 U.S.C. § 315) which permitted broadcasters to deny access to all candidates for any political office so long as such denial was applied consistently. *Cf. John P. Crommelin*, 19 P & F Radio Reg. 1392 (1960). The opinion of the Court of Appeals, if encompassing paid

* This is apparently argued in an effort to bring the case within those lower court decisions holding that when a public body opens itself to one kind of speech, it cannot "discriminate" by barring another. Of course, these decisions apply only to "public" bodies. Moreover, whatever the responsibility may be of the Port of New York Authority, the New York City Transit Authority or the like not to bar the presentation of controversial political views after allowing the presentation of commercial advertisements, the broadcast industry is already surfeited with controversial political speech. It is already obliged by the "public interest" requirements of the Communications Act to present views of all significant sides of public issues that are discussed on the airwaves. There is no claim in the present case of any failure to do so.

editorializing by political candidates, is therefore squarely at odds with § 315 as it existed at the time of *Red Lion* and with *Red Lion* itself. If the opinion is to be read as somehow excluding candidates from its coverage a still more egregious result would follow, since such a reading would afford non-office seekers greater First Amendment rights than those seeking political office. Such an anomalous result can hardly be said to be required by, or even consistent with, the First Amendment.

We close with a final constitutional observation. This Court has rarely been called upon to render so significant a constitutional opinion on so frail a factual record. Justice Brandeis, early in his career, wrote that a constitutional judgment of this Court "should be based upon a consideration of relevant facts, actual or possible—*Ex facto jus oritur*. That ancient rule must prevail in order that we may have a system of living law." *Adams* v. *Tanner*, 244 U.S. 590, 597, 600 (1917) (Brandeis, J., dissenting). See also, *Burns Baking Co.* v. *Bryan*, 264 U.S. 504, 517, 520 (1924) (Brandeis, J., dissenting). And see K. L. KARST, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75.

In the present case, there is not a single word in the record which even suggests that the public has been denied access to the widest range of views as to controversial subjects. Not only has the Court of Appeals totally disregarded the expertise of the FCC*: it has proceeded to issue its own "clarion call" for judicial "activism" (A. 457) unrestrained by a single relevant fact which might have affected its decision as to how to rule. This is particularly striking

* In doing so, it has again acted in a fashion flatly contrary to *Red Lion* in which this Court stressed its reliance upon the expertise of the Commission (395 U.S. at 381-386). We join the FCC and the United States in seeking reversal on this ground.

in light of the facts before the Court in both *BEM* and *DNC*. Not even the most casual television viewer, we submit, could disagree with the judgment of the Court of Appeals for the District of Columbia in *Green* v. *FCC*, 447 F.2d 323 (D.C. Cir. 1971), that issues relating to the Vietnam War "have been ventilated *in extenso* for years on (probably) every television and radio station in the land." * (447 F.2d at 330.) Nor, we submit, can it be seriously argued that the Democratic Party has been unduly restricted in its presentation of views as to the state of the nation, its needs for funds, or any other issue. See, *e.g.*, *Democratic National Committee* v. *FCC*, —— F.2d —— (D.C. Cir. 1972), *petition for cert. filed*, 40 U.S.L.W. 3528 (May 9, 1972).

Indeed, the *BEM* decision does not hold that as to *any* single issue the public has been denied access to the broadest range of partisan views. Yet on this barren record the Court of Appeals has issued its "clarion call", has imposed far more pervasive governmental control over broadcasting, and has fashioned what are, at best, novel First Amendment rules which are hereafter to bind broadcasters, the Commission and Congress alike. We respectfully submit that the First Amendment deserves better of this Court.

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* The submission by CBS (A. 66-170) of its programming with respect to Vietnam (to which NBC could add a lengthy submission) merely demonstrates the accuracy of that which the Court of Appeals had previously held in *Green* v. *FCC*, *supra*.

CONCLUSION

The decision of the Court of Appeals is contrary to the First Amendment and should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-863

COLUMBIA BROADCASTING SYSTEM, INC.,
Petitioner,

v.

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,
Respondents.

No. 71-864

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, *et al.*,
Respondents.

No. 71-865

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
Petitioner,

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, *et al.*,
Respondents.

No. 71-866

AMERICAN BROADCASTING COMPANIES, INC., *Petitioner*,
v.
DEMOCRATIC NATIONAL COMMITTEE, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER COLUMBIA BROADCASTING SYSTEM, INC.

OPINIONS BELOW

The court of appeals' opinion (App. 446-91) is reported at 450 F.2d 642 (1971). The opinion of the Federal Communications Commission in *Democratic National Committee* (App. 247-87) is reported at 25 F.C.C. 2d 216 (1970). The opinion of the Commission in *Business Executives' Move for Vietnam Peace* (App. 357-417) is reported at 25 F.C.C.2d 242 (1970).

JURISDICTION

The judgment of the court of appeals (App. 492-93) was entered on August 3, 1971. Petitions for rehearing were denied by an order of the court of appeals (App. 494-95) entered on October 4, 1971. The petitions for certiorari were filed on January 3, 1972, and granted by this Court by order entered on February 28, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Section 3(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 153(h), provides:

> " 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 315(a), provides:

> "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station; *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. § 326, provides:

"Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

QUESTION PRESENTED

Under the regulatory scheme established by the Communications Act and the policies of the Federal Communications Commission, broadcasters are required to present contrasting views on controversial public issues. The question presented is whether this regulatory scheme is constitutionally sufficient and whether the First Amendment requires the Commission to take the further step of compelling broadcasters who have presented contrasting views on such issues to sell advertising time to partisans for the presentation of their views.

STATEMENT OF THE CASE

These consolidated cases bring to this Court a decision by the Court of Appeals for the District of Columbia Circuit [1] that under the First Amendment the Federal Communications Commission (the "Commission") must require broadcasters to sell advertising time for partisan announcements on public issues. In so ruling, the court reversed two decisions of the Commission which held that licensees, who are required by the Commission's fairness doctrine to present contrasting views on controversial issues of public importance, are not also required to sell time for the presentation by partisans of their views. *Democratic National Committee*, 25 F.C.C. 2d 216 (1970) (hereinafter *"DNC"*); [2] *Business Executives Move for Vietnam Peace*, 25 F.C.C.2d 242 (1970) (hereinafter *"BEM"*).[3]

1. The Commission's *DNC* Ruling.

The *DNC* case arose from a request to the Commission by DNC for a declaratory ruling that broadcast licensees may not refuse to sell time to "responsible entities, such as DNC, for the solicitation of funds and for comment on public issues." [4] DNC did not indicate what views it desired to present in purchased time, nor did it suggest that its views—or those of anyone else—on any particular issue were not being presented by licensees. DNC also made no claim that any licensee had failed to fulfill its responsibilities under the fairness doctrine. Rather, DNC asserted that, regardless of compliance with the fairness doctrine, a broadcaster's refusal to sell time to

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[1] App. 446-91.

[2] App. 247-87.

[3] App. 357-417.

[4] App. 15, 33.

it and other "responsible entities" violated the First Amendment and the Communications Act.[5]

In response to the Commission's invitation for comment,[6] Petitioner Columbia Broadcasting System, Inc. ("CBS"), which is the licensee of radio and television stations and also operates a radio and television network, urged the Commission to deny the requested ruling.[7] CBS argued that the ruling was required neither by the First Amendment nor the Communications Act, and indeed would be inconsistent with the statutory scheme and the First Amendment and detrimental to the public interest.

The CBS response described in detail CBS' policy with respect to the discussion of public issues.[8] That policy, basically, is to present contrasting views on public issues through an extensive schedule of news and public affairs broadcasts.[9] As part of this journalistic effort, direct

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[5] App. 33.

[6] App. 37.

[7] App. 48-80. American Broadcasting Companies, Inc. ("ABC") also filed a response emphasizing its responsibility to provide full and fair discussion of controversial issues and spelling out a general policy of declining to sell time for discussion of public issues "absent special public interest considerations." It opposed any ruling requiring sale of time to all "responsible entities." App. 42-46.

While National Broadcasting Company ("NBC") filed only a short response merely noting its willingness to sell time to DNC (App. 47), it has filed an *amicus* brief in this Court supporting the position of petitioners. As indicated in its brief, NBC does on occasion sell time for discussion of public issues. But, as the NBC brief makes clear, its ability to make the critical judgments of selection under its current policy would be drastically restricted by the court of appeals' decision.

[8] App. 50-58.

[9] The CBS response described in detail the large quantity of news and public affairs broadcasts prepared by CBS News, showing that in the two-year period 1968-1969, CBS presented 1,354 hours of

exposure is provided for partisans and partisan views, on a free basis, in daily news broadcasts. Partisans also regularly appear on public affairs series such as FACE THE NATION, SIXTY MINUTES and CBS REPORTS.[10] In addition, partisans are also given opportunities to make direct presentations on frequent special news broadcasts. Thus, for example, direct access is periodically provided, without charge, for Presidential appearances and for leading opposition spokesmen for comment on specific issues or on issues selected by the spokesmen themselves.[11]

CBS pointed out that it had also adopted a related policy of declining generally to sell time for the presentation of views on controversial issues of public importance because it had concluded that selling time for this purpose would substantially undermine its journalistic efforts.[12]

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news and public affairs broadcasts, including 100 hours of prime-time documentaries and 338 hours of regularly-scheduled hard news broadcasts. App. 52.

[10] App. 54-55, 154-57. In this connection, CBS submitted to the Commission a detailed exhibit showing the numerous partisan views on one issue—the Vietnam War—included in broadcasts presented by CBS News on the CBS Television Network and in broadcasts presented by a representative CBS-owned station (WCBS-TV, New York). App. 81-242.

[11] For the last several years CBS has provided time for a response by opposition Congressional leaders to the President's State of the Union address. See also *Columbia Broadcasting System, Inc.* v. *FCC*, —— U.S. App. D.C. ——, 454 F.2d 1018 (1971), involving a "Loyal Opposition" broadcast presented by CBS. A recent example of a special broadcast directly presenting partisan views is provided by an April 30 CBS News Special Report, "The Issue of Busing," which presented opinions on this controversial issue by a number of partisans on both sides.

[12] Consistent with the Congressional policy reflected in Section 315 of the Communication Act, 47 U.S.C. § 315, and the recently enacted Federal Election Campaign Act of 1971, 86 Stat. 3 (1972), CBS sells time to candidates, their supporters, political parties and spokesmen on ballot issues during election campaigns, and sells advertising time outside of election campaigns to political

The Commission rejected DNC's request for a general declaratory ruling that licensees must sell time for partisan presentations. It pointed out that the legislative history and language of the Communications Act make clear that licensees are not "common carriers" who passively transmit the views of others, but rather are trustees of the frequencies licensed to them, obligated to present contrasting views on controversial issues of public importance. It is through performance of this trust that the "paramount right and interest of the public to be fully informed is protected." [13]

The Commission emphasized that in fulfilling its responsibilities under the Commission's fairness doctrine a licensee must present representative views; that it cannot rule out coverage of controversial viewpoints because it disagrees with them; and that "partisan voices must be included." [14] The Commission noted that no Commission policy precludes the sale of time for discussion of issues, provided that the licensee fully complies with its fairness obligations.[15] But the Commission found that it was not in the public interest to *require* licensees, who already are presenting contrasting views on public issues, also to sell time to partisans to present their particular views. It found, further, that such a requirement would interfere with and undermine the fairness doctrine and the "public trustee" scheme of regulation chosen by Congress and approved by this Court in *Red Lion Broad-*

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parties for fund raising and for expression of views on public issues.

Emphasizing the Section 315 policy, the Commission held in its *DNC* ruling that licensees must sell time for short fund-raising announcements by significant political parties. At the same time it noted that the current policies of the three major networks—ABC, CBS and NBC—were consistent with that holding. App. 269-73.

[13] App. 268.

[14] App. 259.

[15] App. 265.

casting Co. v. *FCC*, 395 U.S. 367 (1969).[16] The Commission concluded that such a requirement would mean that "the public's agenda for discussion of public issues would then be set substantively and increasingly by the affluent—by the person or group which '. . . has the financial resources and interest to purchase sustained access to the mass communications media. . . .'" [17]

Commissioner Johnson dissented, urging the adoption of an even broader requirement for sale of time than that suggested by DNC.[18] He recognized, however, that an individual right to purchase time for public issue discussion might well be incompatible with the fairness doctrine. Should this prove to be the case, Commissioner Johnson stated, the fairness doctrine "could be suspended" to make the requirement of individual paid access feasible.[19]

2. The Commission's *BEM* Ruling.

On the same day that it denied DNC's request for a declaratory ruling, the Commission also rejected a specific complaint of BEM, an organization opposing the Vietnam War, against radio station WTOP (AM), Washington, licensed to Post-Newsweek Stations, Capital Area, Inc., petitioner in No. 71-865.[20] BEM alleged that WTOP

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[16] App. 263-64.

[17] App. 263, quoting *Banzhaf* v. *FCC*, 132 U.S. App. D.C. 14, 34, 405 F.2d 1082, 1102 (1968), *cert. denied*, 396 U.S. 842 (1969). The Commission also recognized that licensees might reasonably conclude that positions on complex issues ought not to be "hawked" like soap. App. 264. Indeed, a number of thoughtful observers have recently criticized the use of spot announcements in election campaigns. *E.g.*, The Twentieth Century Fund, *Voter Time Report* 15 (1969); *Wall Street Journal*, March 9, 1972, p. 12; 118 CONG. REC. S 984-85 (daily ed. Feb. 2, 1972) (remarks of Sen. Stevenson).

[18] App. 274-87.

[19] App. 281.

[20] App. 357-68.

had violated the fairness doctrine by failing adequately to present views opposed to the War and should therefore be compelled to provide BEM free air time to present spot announcements opposed to the War. In addition BEM complained that the station's refusal to sell BEM advertising time to present its announcements violated its rights under the First Amendment.[21]

In response to the complaint, WTOP pointed to its extensive coverage of the Vietnam War issue, both through news coverage and the direct presentation of the views of various partisans,[22] and stated that each of the viewpoints in BEM's proposed announcements had been expressed over the station on a number of occasions.[23] It concluded that broadcasting BEM's announcements would not contribute to further public understanding of this issue.[24]

The Commission rejected the BEM complaint. On the basis of the unchallenged showing by WTOP that it had extensively covered the Vietnam War issue and, indeed, had on other occasions presented viewpoints essentially similar to BEM's, the Commission concluded that BEM had failed to show that the fairness doctrine had been violated.[25] In addition, relying on its *DNC* opinion, the Commission held that the First Amendment did not require WTOP to sell advertising time to BEM to present its views.[26]

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[21] App. 291-96.

[22] App. 313-15.

[23] App. 352.

[24] App. 316-17.

[25] App. 358-66. Review of this aspect of the Commission's decision was not sought in the court of appeals.

[26] App. 366-68.

3. The Court of Appeals' Decision.

On petitions for review of the Commission's *DNC* and *BEM* decisions, a divided panel of the court of appeals reversed the Commission in both cases.[27] Judge Wright, for the majority of the court, held that action by broadcast licensees is equivalent to action by the government.[28] Relying on cases involving such entities as municipally-owned transit systems, the majority went on to hold that under the First Amendment the Commission must require those broadcast licensees who sell time for commercial advertising also to sell advertising time[29] for the presentation of views on public issues.[30]

Attempting to deal with the inherent scarcity of broadcast frequencies, the court below stated that the First Amendment right it was creating was limited and "abridgeable."[31] The court indicated that the Commission may impose or permit licensees to impose "reasonable" limitations on the total amount of advertising time to be sold for editorial discussion and on the amount to be sold to a single individual or group or representatives of a particular viewpoint.[32] However, the court made clear that the Commission may not permit licensees to exercise their traditional responsibility for selecting broadcast material in the public interest. Thus, the

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[27] App. 446-91.

[28] App. 455-64.

[29] Advertising time is sold by broadcasters in short "spot" time segments, typically of one minute or less. The court of appeals' holding does not apply to program time—time devoted to more lengthy presentations of entertainment, news, public affairs and other non-commercial material. App. 464-65, 482-83.

[30] App. 464-89.

[31] App. 467.

[32] App. 484, 485.

court indicated that a request to purchase time may not be rejected on the ground that the issue is one that has been fairly covered by the licensee or is of minimal interest or importance; or that the licensee has already presented without charge the views of the person or group seeking to purchase time or believes that some other person or group is a more appropriate spokesman for the particular views; or even, apparently, that the licensee deems the material sought to be presented to be offensive or otherwise unsuitable for broadcasting into the home.[33]

Judge McGowan dissented, expressing concern that the new First Amendment right created by the court would undermine the public's interest in being informed.[34] The present regulatory system—requiring licensees "to advance the public's right to know" through presentation of contrasting views on controversial issues—was deliberately chosen by Congress, Judge McGowan pointed out, and "has never been thought to be other than within the permissible limits of constitutional choice."[35] Judge McGowan emphasized that the majority's holding would place a "constitutional straightjacket" on the Commission,[36] requiring it to scrap the present regulatory system provided by Congress for one "in which money alone determines what issues are to be aired, and in what format."[37]

After petitions for rehearing were denied,[38] CBS, the Commission and the United States, Post-Newsweek Sta-

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[33] App. 469, 471-73, 477, 485.

[34] App. 489-91.

[35] App. 490.

[36] App. 491.

[37] App. 490.

[38] App. 494-95.

tions, and ABC filed petitions for certiorari.[39] On February 28, 1972, this Court granted the petitions and consolidated the four cases. At the same time, it recalled and stayed the mandate of the court of appeals.

[39] No. 71-863, *CBS* v. *DNC*; No. 71-864, *FCC* v. *BEM and DNC*; No. 71-865, *Post-Newsweek Stations, Capital Area, Inc.* v. *BEM*; No. 71-866, *ABC* v. *DNC*.

SUMMARY OF ARGUMENT

The decision below erroneously holds that the existing scheme of broadcast regulation, which requires licensees to act as trustees for the public interest and to present contrasting views on public issues, is constitutionally inadequate. If the decision below were to stand, Congress and the Commission would be permanently compelled to include in the regulatory scheme a requirement that advertising time be sold for partisan announcements.

The holding of the court of appeals is entirely unprecedented. None of the decisions of this Court or other courts which have considered the application of the First Amendment to broadcasting has suggested that broadcasters are directly subject to the prohibitions of the Amendment on the theory that they are engaged in "state action." None has suggested that the First Amendment confers an affirmative right on members of the public to purchase broadcast time. The courts that have been faced directly with such claims have squarely rejected them. *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946); *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950).

I.

The decision below finds no support in the First Amendment. The primary purpose of the First Amendment is to protect speech and press from governmental intrusion. It would be entirely anomalous if broadcasters, who are themselves protected by the guarantee of a free press, were held subject directly to the restraints of the First Amendment. The result would be that every editorial decision of broadcast licensees would raise an issue of First Amendment dimension, and the courts and the Commission would be compelled to intrude deeply into the functions of broadcast journalists.

Even if the First Amendment operated as a direct restraint on broadcaster action, it would not sanction the result reached by the court below. As this Court has recognized, the broadcast medium is characterized by the limited number of frequencies available for broadcasting, and under these circumstances, "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish." Rather, it is the public's interest in access to ideas that is "paramount." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 388, 390 (1969). The existing scheme of broadcast regulation is based on a fundamental policy judgment by Congress that this interest of the public will be better served by a system of licensee trusteeship, in which broadcasters may reasonably determine what material should be broadcast in the public interest, than by a common carrier system based on indiscriminate access.

In the critical area of public affairs, the regulatory vehicle for ensuring that licensees act in the public interest is the fairness doctrine. By assuring that each licensee will present contrasting views on the vital issues of the day, the fairness doctrine vindicates the public interest in being informed. And it does so in a way completely consistent with the First Amendment interest in robust and partisan debate. Licensees may not exclude particular views because they disagree with them, and must include partisan views in their coverage of public issues. The existing regulatory system not only assures vindication of the public's interest in receiving full information, but also assures that there will be no discrimination against controversial issue discussion in the broadcast medium. The regulatory scheme thus sharply distinguishes broadcasting from other "forums," such as public parks and municipal transit systems, which have no comparable legal obligation to present contrasting views on controversial public issues.

There is no evidence in the record in this case that the existing regulatory scheme does not satisfy the First Amendment interest of the public in access to contrasting views on public issues. The evidence is to the contrary. CBS, for example, submitted a detailed showing that its news and public affairs broadcasts ensure the presentation of contrasting views on controversial issues and include ample opportunity for partisans to present their views directly.

The new right created by the court of appeals is fundamentally inconsistent with the goals of the First Amendment. By eliminating licensee discretion, the decision of the court of appeals would inevitably undermine the fairness doctrine and frustrate the public's interest in being informed. The responsible choices of the broadcast press as to which issues, views and speakers are to be presented would be replaced by the haphazard choices of those who can afford to purchase advertising time to present their views. As the Commission put it, the "agenda of public discussion" would be set "by the affluent." App. 263.

Moreover, any effort to ensure that the required sale of advertising time would not distort debate on issues would inevitably involve the Commission and the courts in making decisions as to which speakers are to be heard, which issues are to be discussed, and how much time is to be devoted to particular issues and views. Such increased governmental intrusion in day-to-day journalistic decisions would pose a serious threat to a free broadcast press.

II.

The court of appeals also erred in holding that action of a broadcast licensee is "state action." Broadcast licensees conduct private enterprises; they are private journalists whose essential separateness from the government is a central principle of both the Communications Act and the First Amendment.

The criteria relied upon by the court of appeals for finding state action are plainly unsound. The mere existence of licensing and regulation has never been held sufficient to make a private business the equivalent of the state. Nor does the Commission's refusal to compel broadcasters to sell advertising time convert broadcaster action into state action. In no sense does such Commission refusal constitute an affirmative endorsement of the policy of those broadcasters who refuse to sell advertising time for partisan announcements. Finally, the fact that broadcasting is an important organ of communication hardly argues for a finding of state action: to the contrary, it emphasizes the constitutional importance of treating the broadcast press, like the printed press, as separate from the government.

ARGUMENT

INTRODUCTION

Three years ago, in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), this Court issued its first comprehensive opinion on the application of the First Amendment to broadcasting and to the regulatory scheme governing broadcasting. In that landmark decision, the Court held that in light of the inherent limitations of the broadcast medium, "it is idle to posit an unabridgeable right to broadcast comparable to the right of every individual to speak, write or publish." [40] The Court sustained the fairness doctrine, under which the Commission requires broadcast licensees to present contrasting viewpoints on controversial public issues, finding that the doctrine serves the central First Amendment interest of the public in access to information.

Since that time, broadcast licensees and the Commission have been faced with a multitude of challenges to the scheme of regulation upheld in *Red Lion*. Ignoring the inherent limitations of the broadcast medium, various individuals and groups have claimed a right to present their views on particular issues, whether or not the licensee has complied with its obligations under the fairness doctrine. In its decisions in the *DNC* and *BEM* cases, the Commission carefully examined and rejected the claim that the Communications Act or the First Amendment creates such a right. The Commission reaffirmed its view that the asserted individual right to purchase time is incompatible with a limited-time, limited-frequency medium, and found that such a right would undermine the fairness doctrine and the public's interest in being informed.

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[40] 395 U.S. at 388.

The majority of the court below has rejected this judgment of the expert agency entrusted by Congress with the sensitive assignment of determining how best to reconcile the conflicting demands on a broadcast medium characterized by change and beset by pressures from many sources.[41] In so doing, the court of appeals has drastically departed from existing authority.

The court below conceded that there was "scant precedent" for its holding and that earlier decisions of the courts of appeals have held that there is no individual right to purchase broadcast time for the discusion of controversial issues.[42] Thus, in the leading case of *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946), the Third Circuit rejected a First Amendment claim by a religious organization seeking to compel a radio station to sell it time. The court found that action by broadcasters was not the equivalent of action by the state. The court held further that plaintiffs' rights had in any event not been violated. Recalling this Court's observation in the *NBC* case that "unlike other modes of expression radio inherently is not available to all," [43] the court stated:

> "True, if a man is to speak or preach he must have some place from which to do it. This does not mean, however, that he may seize a particular radio station for his forum . . . . [A] radio broadcasting station is not a public utility in the sense that it

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[41] In its most recent decision interpreting the Communications Act, this Court overturned a decision of another court of appeals which had substituted its judgment for that of the Commission on a comparable question calling for administrative expertise. *United States* v. *Midwest Video Corp.*, —— U.S. —— (No. 71-506, decided June 7, 1972), slip op. at 26 (plurality opinion). Mr. Chief Justice Burger, concurring in the result, emphasized the need to rely on the Commission's "generations of experience and 'feel' " in such complex areas. Concurring op. at 2.

[42] App. 456.

[43] *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226 (1943).

must permit broadcasting by whoever comes to its microphones." 151 F.2d at 600-01.[44]

The First Circuit reached an identical result in *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950).

Until now these long-standing decisions of the First and Third Circuits had never been questioned by any court. Apart from the decision below, not one of the numerous decisions of this Court and the lower federal courts which have treated free speech and free press issues in broadcasting has suggested that the First Amendment compels Congress and the Commission to require broadcasters to sell advertising time for the discussion of public issues, or that the Commission's fairness doctrine does not adequately satisfy the demands of the First Amendment in the broadcast medium.[45]

To the contrary, it has long been held that "broadcasters are not common carriers and are not to be dealt with as such";[46] that "no individual member of the pub-

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[44] The Third Circuit has recently reaffirmed *McIntire* in rejecting the First Amendment claims of an author to have his article published in the law review of a state law school. *Avins* v. *Rutgers*, 385 F.2d 151, 153 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

[45] *Red Lion, supra; National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); *Democratic National Committee* v. *FCC*, —— U.S. App. D.C. ——, —— F.2d —— (No. 71-1637, decided Feb. 2, 1972), *petition for cert. pending* (Oct. Term, 1971, No. 71-1405); *Green* v. *FCC*, 144 U.S. App. D.C. 353, 447 F.2d 323 (1971); *Mt. Mansfield Television, Inc.* v. *FCC*, 442 F.2d 470 (2d Cir. 1971); *Banzhaf* v. *FCC*, 132 U.S. App. D.C. 14, 405 F.2d 1082 (1968), *cert. denied*, 396 U.S. 842 (1969); *Anti-Defamation League* v. *FCC*, 131 U.S. App. D.C. 146, 403 F.2d 169 (1968), *cert. denied*, 394 U.S. 930 (1969); *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd*, —— U.S. —— (40 U.S.L.W. 3463, March 27, 1972); *Post* v. *Payton*, 323 F. Supp. 799 (E.D.N.Y. 1971). *Cf. Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968).

[46] *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940).

lic has the right of access to the air";[47] and that, so long as they carry out their fairness doctrine responsibilities, "licensees may exercise their judgment as to what material is presented and by whom."[48]

Untroubled by the lack of direct precedent for its holding, the court below relied on a number of decisions of state and federal district courts which have recognized a right to purchase advertising space for editorial messages in *governmentally* owned, controlled or financed entities such as municipal transit systems.[49] In these cases, all of which involved "state action," the courts held that since these "forums" sold advertising space for commercial purposes, they were also required to sell space to those who wish to present messages on public issues.[50]

The questions involved in those cases have never been passed on by this Court, and the correctness of those decisions need not be reached here, for they are clearly inapplicable. Broadcaster action is not "state action."

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[47] *Green* v. *FCC*, 144 U.S. App. D.C. 353, 358, 447 F.2d 323, 328 (1971).

[48] *Ibid.* See also *Post* v. *Payton*, 323 F. Supp. 799 (E.D.N.Y. 1971).

[49] App. 475.

[50] *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967); *Hillside Community Church, Inc.* v. *Takoma*, 455 P.2d 350 (Wash. Sup. Ct. 1969); *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Rptr. 430, 434 P.2d 982 (1967).

The court also relied upon two cases involving state-supported school newspapers. *Lee* v. *Board of Regents of State Colleges*, 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971); *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969). We submit that these cases were incorrectly decided because there is no right of individual access to a journalistic medium. In any event, these cases are distinguishable because they involved state-financed entities clearly engaged in state action and because there is no regulatory scheme applicable to newspapers which ensures the presentation of contrasting views on controversial issues.

(See pp. 47-55, *infra*.) But even if it were, application of the First Amendment to the broadcast medium would not compel Congress and the Commission to require broadcasters to sell advertising time for the expression of partisan views.

As we discuss below, in the broadcast medium the central First Amendment goal is an informed and enlightened public. In pursuit of this goal, Congress and the Commission have chosen a regulatory scheme under which broadcasters, as public trustees, are required to present contrasting views on public issues. This regulatory scheme is unique to broadcasting; a public park or municipal transit system is subject to no comparable requirements.[51]

The regulatory scheme in broadcasting ensures that the public's interest in being informed will be vindicated. It also ensures that there will be no discrimination in the broadcast medium against controversial issue discussion. In light of the responsibility imposed on broadcasters to present constrasting views on controversial issues, the refusal of a licensee to sell time for partisan announcements does not represent a discrimination —invidious or otherwise—against speech on public issues.

Whether or not Congress and the Commission have the power to adopt a requirement of paid partisan access to augment or replace the fairness doctrine, nothing in the First Amendment compels them to do so or invalidates their conclusion that the existing scheme of regulation vindicates the public's interest in being informed.

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[51] This important distinction was adverted to by the California Supreme Court in the very case from which the court below quoted so extensively. See *Wirta* v. *Alameda-Contra Costa Transit District*, 68 Cal.2d 51, 434 P.2d 982, 989-90 (1967).

I. THE FIRST AMENDMENT DOES NOT REQUIRE CONGRESS AND THE COMMISSION TO COMPEL BROADCAST LICENSEES TO SELL ADVERTISING TIME FOR PARTISAN ANNOUNCEMENTS ON PUBLIC ISSUES.

Even if broadcaster action were "state action," this would not require wholesale application of the requirements of the Constitution to broadcasters as if they were the equivalent of the government. A finding of state action, rather, requires a reasoned inquiry into what the Constitution requires in the particular context. Thus, for example, where racial discrimination is at issue, a finding of state action has required that nominally private businesses be directly subject to the limitations of the Equal Protection Clause.[52] A different situation prevails where the First Amendment is involved.[53]

The primary function of the First Amendment is to protect against governmental intrusion on freedom of speech and press. It is entirely anomalous to suggest that the broadcast press, which is itself protected by the First Amendment against such governmental interference, is subject to the same restraints as the government. Indeed, to apply the First Amendment directly to broadcaster conduct would mean that every editorial decision by broadcasters would be tested by First Amendment standards applicable to restrictions on government censorship.[54] Far from serving the purpose of

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[52] See, *e.g.*, *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Hunter* v. *Erickson*, 393 U.S. 385, 391-92 (1969); *McGlotten* v. *Connally*, 338 F. Supp. 448, 458 n.53 (D.D.C. 1972).

[53] See generally FRIENDLY, THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA 26-27 (1971); King, *Rebuilding the "Fallen House"—State Tuition Grants for Elementary and Secondary Education*, 84 HARV. L. REV. 1057, 1075-76 (1971).

[54] If this seems far-fetched, it need only be pointed out that precisely such a claim is being seriously advanced by a producer

the Amendment, this would subvert its purposes by injecting oversight by the Commission and the federal courts into the very heart of broadcast journalism.

In any event, under the First Amendment a particular medium is not "necessarily subject to the precise rules governing any other particular method of expression." *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503 (1952). Differences in the characteristics of particular media "justify differences in the First Amendment standards applied." *Red Lion, supra*, 395 U.S. at 386.[55] There are compelling reasons for applying different First Amendment standards concerning access to a journalistic medium such as broadcasting from those applicable to access to a municipal transit system or park.[56]

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of a former CBS series in litigation in a United States District court. *Smothers* v. *CBS*, C.D. Cal. No. 69-1898-AAH.

[55]This Court has made clear that even a shopping center is different from a municipal facility for purposes of the First Amendment. In *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), this Court held that the First Amendment requires shopping center owners to open their facilities to peaceful labor union picketing. At the same time, the Court took pains to note that: "[I]t may well be that respondents' ownership of the property here in question gives them various rights . . . to limit the use of that property by members of the public in a manner that would not be permissible were the property owned by a municipality." 391 U.S. at 319.

[56] A recent decision involving a magazine that was an organ of a state educational institution (and thus engaged in "state action") makes clear that a journalistic medium is not to be treated like an ordinary public facility. There the court specifically held that the First Amendment did not deprive the editors of a law review of their right to select material for publication or compel them to grant access for the expression of particular views. *Avins* v. *Rutgers*, 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

A. The Goal of the First Amendment in Broadcasting Is to Produce an Informed Public, Rather Than to Guarantee Access to Partisan Spokesmen to Present Their Particular Views.

At the outset it should be recognized that the function of the First Amendment is to protect against governmental interference in speech and press, not to afford individual opportunities for access to particular forums. While the First Amendment may limit restrictions on access to particular government-controlled forums,[57] any claim of access must be measured by the central goal of the First Amendment, which is to produce "an informed public capable of conducting its own affairs"[58]—"a more capable citizenry and more perfect polity."[59] The crucial interest at stake is the "interest of the public in hearing all sides of a public issue." *Bond* v. *Floyd*, 385 U.S. 116, 136 (1966). As this Court said of the struggle to establish freedom of the press, "in the ultimate, an informed and enlightened public opinion was the thing at stake." *Grosjean* v. *American Press Co.*, 297 U.S. 233, 247 (1936). Indeed, as another panel of the court below stated in upholding the constitutionality of the Commission's cigarette fairness ruling: "Debate is not primarily an end in itself. . . . [T]he provision of information is no small part of what the First Amendment is about."[60]

Thus, the First Amendment guaranty of freedom of expression is primarily rooted, not in the value of indi-

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[57] See cases cited in note 50, *supra*.

[58] *Red Lion*, *supra*, 395 U.S. at 392.

[59] *Cohen* v. *California*, 403 U.S. 15, 24 (1971). See also *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 41 (1971) (plurality opinion); *Whitney* v. *California*, 274 U.S. 357, 375-77 (1927) (Brandeis and Holmes, J.J., concurring).

[60] *Banzhaf* v. *FCC*, 132 U.S. App. D.C. 14, 34, 35, 405 F.2d 1082, 1102, 1103 (1968), *cert. denied*, 396 U.S. 842 (1969).

vidual expression for its own sake, but in the value of free expression and debate in creating an informed public. "[W]hat is essential is not that everyone shall speak, but that everything worth saying shall be said." [61]

In cases involving newspapers and forums other than broadcasting not characterized by a scarcity of available opportunities, the assumption has been that the goal of an informed public is best served by protecting the right of each individual to speak or publish.[62] In broadcasting this same goal is met through different means. As this Court noted in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226 (1943), the unique characteristic of broadcasting which distinguishes it from the printed media is the scarcity of available frequencies. It follows, said the Court, that

> "Freedom of utterance is abridged to many who wish to use the limited facilities of radio. . . . Because it cannot be used by all, some who wish to use it must be denied." 319 U.S. at 226.

In *Red Lion*, the Court reiterated that the basic fact of scarcity is central to the application of the First Amendment in broadcasting. The Court proceeded from the fundamental premise that

> "where there are substantially more individuals who want to broadcast than there are frequencies to allocate, *it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.*" 395 U.S. at 388. (Emphasis supplied.)

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[61] MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1960).

[62] Even there, the interest of the individual in exercising his freedom of speech must in a number of circumstances give way to the interests of the public as a whole. See, *e.g.*, *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451, 464 (1952); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949).

Instead, there is a collective interest in the public in "suitable access to social, political, aesthetic, moral, and other ideas and experiences." 395 U.S. at 390. It is this interest of viewers and listeners which is "paramount." *Ibid.* As the Commission aptly put it in this case, the central First Amendment interest thus described in *Red Lion* "is an issue-oriented 'right of access,' not the right of any individual to access." [63]

The court below disregarded these essential teachings. Notwithstanding this Court's clear statement in *Red Lion* that in broadcasting the public's interest in access to information is "paramount," the court of appeals asserted that this "has not been considered the central First Amendment interest." [64] And notwithstanding the basic theory of *Red Lion* and *NBC* that there cannot be a general right in members of the public at large to broadcast their own views, the court below created a broad constitutional right of paid partisan access.

In an apparent effort to harmonize its decision with *Red Lion* and *NBC*, the court below also suggested that this newly fashioned right could be rationalized even in terms of the public's interest in being informed.[65] As we now discuss, this suggestion is also plainly incorrect. The existing scheme of broadcast regulation vindicates the public's interest in access to views on public issues, and the right created by the court of appeals would substantially undermine that interest.

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[63] App. 266. This is not to suggest, of course, that each and every remedy designed to further full public information would be consistent with the First Amendment. Each case requires a careful examination of the impact of the particular regulation on freedom of speech and press.

[64] App. 466 n. 28.

[65] App. 471.

B. Congress' Chosen Scheme of Regulation, Under Which Licensees, As Trustees for the Public, Are Responsible for Presenting Contrasting Views on Controversial Public Issues, Affirmatively Serves the Public's Interest in Being Informed.

1. In Enacting the Communications Act Congress Deliberately Rejected a System of Individual Access to the Airwaves in Favor of a System of Trusteeship Regulation Designed to Vindicate the Interests of the Listening and Viewing Public.

The court below recognized in its opinion that there is no serious claim in this case that the Communications Act of 1934 (as distinguished from the First Amendment) requires broadcast licensees to sell advertising time to individuals or groups to present their particular views on public issues.[66] Nor could there be. "[T]he foundation stone of the American system of broadcasting," as the Commission stated in its landmark *Report on Editorializing*, is the "right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter. . . ." 13 F.C.C. 1246, 1249 (1949).

When Congress framed the Communications Act, it sharply distinguished between media designed for the communication of private messages, like telephone and telegraph, and broadcast radio, which was designed to inform and enlighten the listener. Those who transmit private messages for hire were made common carriers, subject to the obligation to sell time to any individual or group desiring to transmit its particular message.[67] On the other hand, Congress concluded that it could not

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[66] App. 455.

[67] See Sections 201-02 of the Communications Act, 47 U.S.C. §§ 201-02.

achieve the public information function of radio broadcasting if licensees were made common carriers.

In the area of broadcasting, Congress developed a regulatory scheme based on two major premises: First, broadcast frequencies were to be licensed by a regulatory agency for limited terms to those applicants best qualified to serve the public interest. Second, those to whom frequencies were assigned were not to have the purely passive role of carrying the messages of those who desired to purchase time; rather, licensees were to be responsible and accountable for selecting broadcast material as trustees for the interests of the public as a whole.

The fundamental decision that broadcasters are to be trustees for the public, not common carriers, underlies the entire system of broadcast regulation in the Communications Act. It is reflected in the existing provisions of Title III, under which licensees are charged to operate their facilities in the "public interest, convenience and necessity." 47 U.S.C. §§ 307(a), 309(a), 310(b), 315(a). It is reflected preeminently in the fairness doctrine, developed by the Commission and incorporated into the Communications Act in 1959[68]—under which broadcasters are obligated to present contrasting views on significant public issues. And it is reflected in Section 3(h) of the Act, 47 U.S.C. § 153(h), which expressly provides that licensees are not to be deemed common carriers, and in Section 326 of the Act, 47 U.S.C. § 326, which protects licensees from Commission censorship.

This basic policy decision is corroborated in the legislative history—both of the Communications Act of 1934 and of its predecessor, the Radio Act of 1927, 44 Stat. 1162. As the Commission emphasized in its ruling in the instant case, that legislative history shows that "Congress specifically debated and rejected the idea of the licensee

[68] See *Red Lion, supra*, 395 U.S. at 381-85.

being required to act as a common carrier with respect to transmission of comments on public issues." [69]

The legislative history makes clear that the central factor leading to the enactment of the Radio Act of 1927 was that chaos had resulted from a system in which, in the absence of effective regulation, all who wished to broadcast were free to do so.[70] It was clear to Congress that:

> "the right of all our people to enjoy this means of communication can be preserved only by the repudiation of the idea . . . that anyone who will may transmit and by the assertion in its stead of the doctrine that the right of the public to service is superior to the right of any individual. . . ." [71]

Pursuant to this conviction, Congress deliberately eliminated a provision in the bill which would have made broadcasters common carriers as to "any question affecting the public," because such a requirement would compel the broadcaster to "accept anything and everything that was offered him so long as the price was paid." [72]

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[69] App. 260.

[70] *NBC, supra,* 319 U.S. at 211-13; *Red Lion, supra,* 395 U.S. at 375-77.

[71] 67 CONG. REC. 5479 (1926) (remarks of Representative White), quoted in *Red Lion, supra,* 395 U.S. at 376 n.5.

[72] 67 CONG. REC. 12502 (1926) (remarks of Senator Dill). See also 67 CONG. REC. 12358 (1926). The bill as introduced contained such a provision. 67 CONG. REC. 12503 (1926); S. Rep. No. 772, 69th Cong., 1st Sess. (1926), p. 4. In the light of the criticisms of Senator Dill, quoted in the text, the bill was revised on the floor of the Senate to eliminate the common carrier provision. As passed (and as re-enacted as Section 315 of the Communications Act of 1934), this section of the Radio Act dealt only with political candidates, and created no common carrier obligation either as to candidates or as to public issues. Rather, the section required only that equal opportunities be provided to opposing candidates once the licensee had chosen to afford time to a particular candidate. Indeed, the section as enacted con-

In administering the Radio Act of 1927, the Radio Commission early adopted the view that the Act vested responsibility for broadcast material in the licensee and was inconsistent with any individual right to purchase broadcast time. In a major policy pronouncement in 1929, the agency stated that "the duties of broadcasting stations are to listeners," unlike those of common carriers, which run to the "sender" of messages. *Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32, 33 (1929). If broadcasters, like common carriers, had to accept and transmit the messages of those who could afford to pay, the Commission noted, "this obligation would extend to anything and everything any member of the public might desire to communicate to the listening public, whether it consist of music, propaganda, reading, advertising, or what-not." 3 F.R.C. Ann. Rep. at 32. Any such requirement would be both impractical and undesirable:

> "In the present state of the art there is no way of increasing the number of stations without great injury to the listening public, and yet thousands of

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tained a provision to the effect that "no obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate [in the first instance]." Congress' concern that the Section 315 requirements not unduly inhibit or interfere with broadcast journalism was reflected in 1959 amendments exempting news and other journalistically supervised broadcasts from the equal opportunities provisions. 73 Stat. 557 (1959).

Just recently, Congress enacted, as Section 103 of the Federal Election Campaign Act of 1971, 86 Stat. 3 (1972), a provision making it a violation of the Communications Act for a licensee willfully or repeatedly to fail "to allow reasonable access to or to permit purchase of reasonable amounts of time" by candidates for federal office. This provision represents the first time that Congress has created a specific individual right to purchase broadcast time that does not depend upon a previous use by opposing candidates. In thus specifically creating a limited right of access for a very narrow class of persons—federal candidates—Congress clearly confirmed that, apart from such specific statutory provisions, there is no general right of access to broadcast facilities.

stations might be necessary to accommodate all the individuals who insist on airing their views through the microphone. If there are many such persons, as there undoubtedly are, the results would be, first, to crowd most or all of the better programs off the air, and second, to create an almost insoluble problem, i.e., how to choose from among an excess of applicants who shall be given time to address the public and who shall exercise the power to make such a choice." 3 F.R.C. Ann. Rep. at 33.[78]

Finally, in 1934 Congress put any remaining doubt as to its intentions to rest by including in the Communications Act a provision that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." Section 3(h), 47 U.S.C. § 153(h). As this Court has noted, Section 3(h) represents an expression of Congress' view that "broadcasters are not common carriers and are not to be dealt

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[78] The Radio Commission's construction of the 1927 Act in this respect is particularly significant, since the provisions of the Act were transposed, more or less intact, into the Communications Act of 1934. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940); *NBC, supra*, 319 U.S. at 213-14. The views of the Radio Commission on this point were made explicit to Congress in conjunction with its consideration of the Communications Act of 1934. In that year, Chairman Sykes of the Radio Commission testified against a bill which would have forbidden discrimination by any licensees against programs sponsored by religious, charitable or educational associations, effectively guaranteeing such groups an individual right to purchase broadcast time. Chairman Sykes pointed out that this proposal was "directly contrary to broadcasting as it has grown up in the United States prior to the Act of 1927 and is directly contrary to the theory of broadcasting under the Act under which we operate. . . ." Chairman Sykes also stated that the Radio Act of 1927:

> "puts upon the individual licensee of a broadcast station the private initiative to see that those programs that he broadcasts are in the public interest .... Then that act makes those individual licensees responsible to the licensing authority to see that their operations are in the public interest." *Hearings on H.R. 8301 Before the House Committee on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. (1934), pp. 349-52.

with as such." *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940). The courts have repeatedly recognized that licensees are responsible for selecting broadcast material that, in their judgment, serves the needs and interests of the public in the communities they are licensed to serve.[74]

In recognition of the principle that the obligation of the broadcaster runs to the public, rather than to individuals and groups seeking to present their particular views, the Commission adopted the fairness doctrine to ensure that the public's need for information would be vindicated. The fairness doctrine was first set forth in detail in the Commission's 1949 *Report on Editorializing*, 13 F.C.C. 1246 (1949), and was incorporated into the Communications Act in 1959.[75]

The fairness doctrine requires broadcast licensees to cover significant public issues, and to present contrasting views on those issues. See generally *Red Lion*, *supra*, 395 U.S. at 369, 377-78. As the Commission made clear in its opinion in the present case, this duty may not be carried out by licensees in a bland fashion, with all viewpoints filtered through the licensee itself.[76] Nor may licensees refuse to present particular

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[74] *E.g.*, *FCC* v. *Sanders Bros. Radio Station*, *supra*; *McIntire* v. *William Penn Broadcasting Co.*, *supra*; *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, *supra*; *Regents of New Mexico College of Agriculture & Mechanic Arts* v. *Albuquerque Broadcasting Co.*, 158 F.2d 900, 905-06 (10th Cir. 1947); *Pulitzer Pub. Co.* v. *FCC*, 68 App. D.C. 124, 126, 94 F.2d 249, 251 (1937).

For a detailed exposition of the nature of licensee responsibility for all broadcast material—both program and commercial matter—see *Report and Statement of Policy Re: Network Programming Inquiry*, 25 Fed. Reg. 7291 (1960).

[75] 73 Stat. 557 (1959), amending Section 315 of the Communications Act, 47 U.S.C. § 315. See *Red Lion*, *supra*, 395 U.S. at 381-85.

[76] App. 259.

views because they disagree with them.[77] They must present "representative community views and voices" on public issues and "some of the voices must be partisan. A policy of a licensee of confining itself to presenting views in a bland, inoffensive manner and of excluding partisan voices would run counter to the 'profound national commitment' that debate on public issues should be uninhibited, robust, and wide-open."[78]

But the hallmark of the fairness doctrine is licensee responsibility, and its touchstone is the public's interest in being informed. The fairness doctrine is implemented through licensee judgments as to which issues should be covered and which spokesmen presented. Licensees may reject requests for time to speak on the ground that the issue in question is insignificant, or that the views in question have already been presented or can be presented in some more effective fashion.[79] In short, licensees have discretion—within the limits of reasonableness—to choose how best to present opposing views on public issues in order to ensure that the frequencies they are assigned will be used to serve the interests of the listening and viewing public. The fairness doctrine is based on the firm

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[77] *Ibid.*

[78] App. 259, citing *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

The fairness doctrine is enforced through the license renewal process, through Commission rulings in response to individual complaints and through specific regulations dealing with personal attacks and political editorializing. See *Red Lion, supra*, 395 U.S. at 373-75. To ensure that licensees are continually informed as to the needs and interests of the public they serve, the Commission requires in-depth, comprehensive surveys of community leaders and members of the general public as a basis for programming proposals in connection with license renewal applications. See *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C.2d 650 (1971).

[79] *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1251-52 (1949).

recognition that the statutory scheme established by Congress is one based on licensee responsibility to serve the public, not on an indiscriminate right of access to the airwaves.[80]

2. *The Existing System of Broadcast Regulation Vindicates the First Amendment Interest of the Public in Being Informed.*

As Judge McGowan pointed out in the court below,[81] and as prior decisions make clear,[82] the public interest in being informed is vindicated by the Commission's fairness doctrine and related policies.

In the light of the Congressional scheme, it would require strong evidence to establish that the fairness doctrine and the existing broadcasting system have failed to satisfy the First Amendment interest of the public in full and robust discussion. Despite its acerbic criticism of television generally, the court below made no such finding. Nor has the Commission—which is the expert

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[80] App. 266. See also *Green* v. *FCC*, 144 U.S. App. D.C. 353, 358, 447 F.2d 323, 328 (1971); Loevinger, *Free Speech, Fairness and Fiduciary Duty in Broadcasting*, 34 LAW & CONTEMP. PROB. 278, 291 (1969).

[81] App. 490.

[82] In *Red Lion*, this Court found that the existing regulatory scheme, including the fairness doctrine, "enhanced" First Amendment interests. 395 U.S. at 375. See also *Office of Communications of United Church of Christ* v. *FCC*, 138 U.S. App. D.C. 112, 117, 425 F.2d 543, 548 (1969); *Democratic National Committee* v. *FCC*, —— U.S. App. D.C. ——, —— F.2d —— (No. 71-1637, decided Feb. 2, 1972), *petition for cert. pending* (Oct. Term, 1971, No. 71-1405):

> "The importance of the fairness doctrine is neither academic nor is it an administrative nicety.... The importance of the doctrine is evident and it is the manifest intention of the Commission to maintain it as a viable instrument in protecting the right of the public to be fully informed on controversial issues." Slip op. at 15-16. (Footnote omitted.)

body chosen by Congress to assure that broadcasters serve the public interest. To the contrary, the Commission concluded in this case that the existing system serves the First Amendment interest of the public in being informed and that requiring licensees to sell time would not contribute to the goal of an informed public.

Nothing in the record before the Commission and the court of appeals supports any claim that the present system, including the fairness doctrine, does not serve the public interest in securing full information, or that the creation of an individual right of paid access is necessary to ensure the airing of partisan views on public issues. Indeed, to the extent that there is evidence in this record as to the practices of licensees, it fully supports the Commission's view that the regulatory scheme chosen by Congress and the Commission assures robust debate on public issues and the presentation of the views of partisans.

Thus, in the *BEM* case—involving a demand to purchase advertising time to present views opposed to the Vietnam War—Station WTOP demonstrated that it had comprehensively presented a large number of opposing viewpoints on the War, including the very views espoused by BEM.[83] Similarly, as part of its response to DNC's request for declaratory ruling, CBS submitted to the Commission a lengthy exhibit detailing the coverage of the Vietnam War by the CBS Television Network and WCBS-TV (New York City).[84] That exhibit amply showed how the journalists of CBS News and WCBS-TV have provided a broadly informative presentation of representative views on the War issue and ample direct exposure for partisans and partisan views.

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[83] App. 313-15, 352.

[84] App. 81-242.

On the basis of these showings it is difficult to understand how requiring WTOP—or CBS—to sell advertising time to discuss the issue of the Vietnam War, or to present the views of BEM in particular, could materially contribute to a better understanding of this significant issue.[85] The court of appeals, however, fashioned a new constitutional right that would compel the Commission to require broadcasters such as WTOP and CBS to sell additional time for the presentation of views on the Vietnam War, even though that issue has been fully and fairly covered and even though the very view sought to be expressed in editorial advertisements may have been presented hundreds of times in the course of the broadcasters' journalistic coverage of that issue.

The court below reached a similar result with respect to the DNC request for declaratory ruling even though DNC did not indicate what issues and views it desired to discuss in purchased time and made no effort to establish that any particular views espoused by DNC—

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[85] As another panel of the District of Columbia Circuit aptly observed: "[W]e cannot conceive that any live American has been left uninformed about the desirability or undesirability of military service, the draft, or the Vietnam War." *Green* v. *FCC*, *supra*, 144 U.S. App. D.C. at 359, 447 F.2d at 323. Moreover, radio and television stations are not the only sources of public information on controversial issues or the only forums available for speech. As the court of appeals stated in *Democratic National Committee* v. *FCC*, *supra*, slip op. at 37-38:

> "Daily all of the media—not merely broadcast media—carry stories, articles and reports by opponents to the President, from the opposition party as well as his own party. In this nation the varying viewpoints are available to any person seeking to hear or read them. A citizen desiring to be informed need only pick up a newspaper or news magazine, flick on his radio, or tune in his television. Information indicative of all viewpoints is available merely for the seeking."

In addition, as the Commission noted in its opinion in this case, new forums for speech on public issues will be created with the growth of CATV systems, which, with their greater channel capacity, can accommodate "public access" channels. App. 266.

or anyone else—had not been presented. Indeed, it is clear that Democratic Party spokesmen have been given ample broadcast opportunities to present their views directly. CBS, for example, pointed out below that it would sell advertising time to political parties.[86] It also pointed out that it devotes substantial time to presenting the views of DNC and other Democratic spokesmen, not only in news and information broadcasts, but also in unedited presentations such as responses to Presidential State of the Union addresses and "Loyal Opposition" broadcasts. See *Columbia Broadcasting System, Inc.* v. *FCC*, —— U.S. App. D.C. ——, 454 F.2d 1018 (1971).

The record before this Court thus offers not the slightest support for a finding that the public's interest in being informed through vigorous discussion of public issues is not being served under the existing regulatory system or that broadcasters have discriminated against the discussion of public issues. Nor does it offer the slightest support for imposing a requirement that broadcasters sell advertising time for the presentation of partisan announcements.

However, even if there were evidence in this case that the public interest in being informed was not being served, the remedy chosen by the court of appeals, as we now show, is utterly inappropriate.[87]

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[86] App. 58.

[87] The remedy would lie with the Commission, which is now in the process of completing a comprehensive inquiry designed to determine whether the fairness doctrine is fully achieving the goal of an informed public. *Notice of Inquiry*, Docket No. 19260, 30 F.C.C. 2d 26 (1971).

C. The Right of Paid Partisan Access Created by the Court of Appeals Would Interfere with the Paramount Interest of the Public in Being Informed and Would Lead to an Increase in Government Control of Broadcast Speech Which Would Be Inconsistent with the First Amendment.

As the Commission concluded in this case—based on years of experience in administering the fairness doctrine—the public's interest in access to information on public issues would be undermined by a requirement that broadcasters sell time for the presentation of individual views. This judgment was shared by Judge McGowan in his dissent in the court of appeals. As we have shown, it is also a judgment fully shared by Congress.

In a limited-time medium such as broadcasting, the public's interest in access to information cannot be served by a common carrier approach, in which individual views are aired on a first-come, first-served basis. Judgments as to which subjects should be covered and which speakers should be heard—and to what extent—must be made by someone. Congress and the Commission have wisely chosen to leave these choices to licensees acting as trustees for the public—and not to the government. The system can function properly, however, only when licensees enjoy the discretion that Congress intended. As the District of Columbia Circuit recently put it, the fairness doctrine "can only succeed when the licensee exercises that discretion upon which he is instructed to call upon in dealing with coverage of public issues." [88]

Ironically, it is precisely this element of licensee responsibility so central to the scheme upheld in *Red Lion* that led the court below to find the existing regulatory scheme constitutionally inadequate. And it is the element

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[88] *Democratic National Committee* v. *FCC*, —— U.S. App. D.C. ——, —— F.2d —— (No. 71-1637, decided Feb. 2, 1972) slip op. at 17, *petition for cert. pending* (Oct. Term, 1971, No. 71-1405).

that would be excluded from the new constitutional regime. The constitutional deficiency of the present regulatory scheme, the court below declared, is that it permits broadcast licensees discretion to judge "what issues are 'important,' how 'fully' to cover them, and the format, time and style of the coverage." The interests of the First Amendment can be satisfied, the court of appeals held, only if the Commission requires that individual members of the public have "initiative and editorial control." [89] The Commission may not permit a licensee "to exercise the same 'authoritative selection' in editorial advertising which he exercises in normal programming." [90]

While the court of appeals speaks in reassuring generalities about the power of licensees to impose "reasonable" limitations on the sale of advertising time for partisan presentations, the opinion excludes the exercise of any meaningful licensee judgment. It makes clear that licensees cannot be permitted to refuse to sell advertising time on the ground that similar or identical viewpoints have already been fully presented; or that the issue to be discussed is trival; or that there are significant issues more deserving of coverage; or that the material sought to be presented is unduly inflammatory, offensive or otherwise unsuitable for broadcasting into the home.[91]

The court of appeals conceded that it is necessary that licensees exercise this discretion and responsibility with respect to "normal programming time," but it suggested that existing practices with respect to commercial advertisers demonstrate that there is no need for licensees to have such discretion and responsibility concerning advertising time.[92] The suggestion demonstrates that the court of

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[89] App. 469.

[90] App. 485.

[91] App. 471-73, 477, 485.

[92] App. 464, 484.

appeals has seriously misconceived existing advertising practices.

In considering requests for commercial time, licensees now exercise broad discretion in determining availability of time and scheduling of advertisements. Broadcasters can and do reject commercial advertisements on the ground that the claims made are false, defamatory, unsuitable for broadcast or contain discussion of controversial issues. Indeed, while the line between advertisements which treat controversial issues and those which do not may at times be difficult to draw, CBS, like many other broadcasters, has made a conscious and careful decision to exclude controversial issue discussion from commercial advertisements. CBS has adopted this policy because it believes that the public will best be served if the issues and speakers to be presented, format, length of presentation and the like are generally determined by broadcast journalists.[93] The court of appeals' decision would effectively require, not only that CBS sell time for editorial announcements, but that it abandon this salutary policy of excluding controversial issue discussion from commercial announcements for products and services.

Thus, broadcasters are now able to deal effectively with commercial advertisements for products and services precisely because of the discretion they have and use, and because they do not face constant legal challenges to their decisions. If every request for time by commercial adver-

[93] The CBS policy with respect to the discussion of controversial issues by advertisers has a long history. CBS, at the very advent of commercial television, concluded that the interests of the listening and viewing public would be far better served by a system in which news, information and controversial issue discussion was in general presented under the journalistic supervision of CBS News, free of advertiser domination or influence. See Comments of CBS, FCC Docket No. 12782, May 2, 1966, pp. 99-102.

tisers carried with it a constitutional claim cognizable first before the Commission and then before the courts, licensees would face serious problems in administering the existing system of broadcast commercial advertising. Under the court of appeals' decision, the flexibility that licensees now exercise with respect to commercial advertising would be denied with respect to editorial advertising.[94]

Moreover, by depriving licensees of the discretion essential to the fairness doctrine, the court of appeals' decision would undermine the public's interest in being informed, and thus would be contrary to the policies of the First Amendment.[95] Eliminating the mechanism of licensee responsibility would create a vacuum to be filled by the haphazard choices of individuals and groups who have neither professional journalistic responsibility nor any statutory obligation to serve the public. In many cases—since the licensee would have no control over what issues are discussed by those who purchase time—the result would be to require licensees to devote time to the presentation of views on stale or trivial issues rather than views on issues of greater significance. Overall coverage of public issues would inevitably be skewed, with some issues receiving more attention than they merit

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[94] The fact that some broadcasters may now choose to sell some advertising time for public issue discussion does not, again contrary to the court's suggestion (App. 484), demonstrate the workability of the constitutional requirement imposed by the decision below. For broadcasters who now sell such time do so with the freedom—indeed the obligation, under the fairness doctrine—to make their own judgments concerning the importance of the issues, the amount of time previously devoted to the views in question, the appropriateness of the speakers who desire to purchase time, and similar questions. Resolution of such questions is essential to the proper discharge of licensee responsibility. The decision below would deny licensees this critical discretion.

[95] The Commission found that the relief sought by DNC and BEM would have precisely this result. App. 263-69.

and other issues less attention than they merit or no attention at all.[96]

The court of appeals' opinion, moreover, would create a new government-imposed requirement that would favor those with the financial resources to purchase broadcast time. At present, the fairness doctrine assures that the public will have access to contrasting viewpoints on significant public issues regardless of the relative financial resources of the partisans holding views on the various sides of those issues. The particular speakers who appear are chosen, not by the size of their pocketbooks, but by their newsworthiness and appropriateness as spokesmen.[97] Under the court of appeals' decision, however, only those who could afford to purchase time would have an enforceable individual right to do so and to speak on issues of their own choosing. As the Commission aptly put it, "the pub-

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[96] The problems of requiring the sale of advertising time for partisan presentation would be especially acute if the fairness doctrine applied in this area, since its application would require broadcasters to present replies to views expressed by those who have purchased time. In view of the burdens that application of the fairness doctrine would impose on broadcasters and the general scarcity of broadcast time, Commissioner Johnson recognized that the fairness doctrine might have to be suspended with respect to advertising time sold for discussion of public issues. App. 281.

Suspension of the fairness doctrine in this area might well be both appropriate and necessary. As Commissioner Cox pointed out in his concurring statement in the *BEM* case, application of the fairness doctrine would lead to an erosion of the advertising revenues upon which the broadcast press is based. App. 369. Commissioner Cox also recognized that requiring free time for replies may well be appropriate where necessary to ensure fairness in situations in which a broadcaster has *elected* to present one side of a controversial issue on a paid basis; but it is inappropriate in situations in which the licensee has been *required* to sell time for the initial paid presentation. App. 369.

[97] See, *e.g.*, CBS Comments, App. 51, 59.

lic's agenda for discussion of public issues" would be set "by the affluent." [98]

Under existing Commission policy, licensees may sell time for discussion of public issues, subject to the fairness doctrine. This practice, of course, does not violate the First Amendment.[99] But the First Amendment cannot plausibly be held to *require* the creation of a new right exercisable only by the affluent. Indeed, in other areas, a government-mandated preferred position for the affluent has been held to be unconstitutional.[100]

The court below was troubled by the possibility that the requirement it was adopting would lead to domination of the broadcast medium by affluent partisans.[101] It suggested that this result could be avoided by the adoption of "reasonable regulations" by the Commission limiting, for example, the "amount of advertising time that would be sold to one group or to representatives of one particular narrow viewpoint." [102] Such "reasonable regulations," however, would still leave the *agenda* of discussion to be set by the affluent rather than by licensees responsible to the public. And the inevitable differences of view as to both the reasonableness and application of the regulations could lead only to repeated appeals to the Commission and the courts to decide who shall speak, and on what subjects, and how often.

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[98] App. 263.

[99] Even a governmental body, for example, can impose a reasonable charge for the use of governmental facilities or for services. See, *e.g.*, *Bullock* v. *Carter*, 405 U.S. 134, 148-49 (1972).

[100] See, *e.g.*, *Griffin* v. *Illinois*, 351 U.S. 12 (1956) (state may not deny transcripts to indigent appellants); *Boddie* v. *Connecticut*, 401 U.S. 371 (1971) (state may not deny indigents access to courts in divorce actions); *Bullock* v. *Carter*, 405 U.S. 134 (1972) (invalidating state requirement of high filing fees for candidates); *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1966) (striking down poll tax).

[101] App. 484.

[102] App. 485.

This necessarily follows from the fact that the court of appeals' goal of dispersing the decision-making power now lodged in licensees among individual members of the public simply cannot be achieved. The public interest in access to contrasting views on important issues cannot be left to the happenstance of a first-come, first-served rule or some other mechanical allocation of time. Judgments as to which subjects should be covered and which speakers should be heard must be made by someone—either by the licensee or by the government.

The likely end result of the court of appeals' decision, we submit, is that these judgments would increasingly be made by the government. Take, for example, the court of appeals' suggestion that there might be a rule limiting "the amount of advertising time that will be sold to one group or to representatives of one particular narrow viewpoint." [103] The application of such a rule would obviously require judgments including (1) the time limit to be imposed and (2) whether particular groups or spokesmen in fact represent "one narrow viewpoint." Both types of judgments are difficult ones; indeed, the court itself argues that the latter judgment is particularly subtle—too subtle to be left in the hands of broadcast licensees, even subject to Commission review for unreasonableness.[104] Any person or group denied the right to purchase advertising time under such a rule would have a claim—a constitutional claim—that would have to be resolved by the Commission and, eventually, the courts.

Thus, the ironic and dangerous result of a decision intended to disperse responsibility for choice of views and spokesmen from broadcast licensees to the public at large would be to increase drastically the role of the govern-

[103] App. 485.

[104] App. 472.

ment in making these choices. It would be difficult to imagine a course more at odds with the First Amendment. Governmental dictation of what issues, views and spokesmen are to be heard is the heart of censorship and the antithesis of a free broadcast press.[105] If the First Amendment stands for anything, it represents a commitment to the proposition that the interest of an informed public will better be served by having individual journalists rather than the government select material to be presented in the press.

In sum, the new requirement created by the court of appeals would distort coverage of issues, permit the affluent to set the agenda for discussion, and lead inevitably to a vastly increased role for the government in choosing the views and speakers to be aired. We submit that this result is incompatible with the First Amendment.

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[105] See, *e.g.*, CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 641 (1965).

II. IN ANY EVENT, THE FIRST AMENDMENT DOES NOT OPERATE AS A LIMITATION ON THE ACTION OF LICENSEES IN SELECTING SPOKESMEN ON PUBLIC ISSUES BECAUSE BROADCASTER ACTION IS NOT "STATE ACTION."

The court of appeals' decision is also vulnerable on an independent ground: it erroneously held that broadcast licensees must be viewed as the state and that the First Amendment therefore imposes direct limitations upon their actions.

Before the decision below, no court had suggested that broadcasters, or other competitive journalistic media,[106] are subject generally to the limitations which the First Amendment imposes upon government.[107] The First and Third Circuits, indeed, had held the contrary [108] and it was generally accepted that, while Congress and the Commission have certain powers to regulate the broadcast medium, broadcasters remain vital organs

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[106] See note 131, *infra*.

[107] The court below erroneously suggested that *Red Lion* held that the First Amendment applies as a limitation on broadcaster action because there was no other ground for upholding the Commission's fairness doctrine. In fact, the fairness doctrine could be, and was, sustained by the Court on the ground that it was authorized by the Communications Act, which represents an exercise of Congress' power under the Commerce Clause, not the First Amendment.

Red Lion neither holds nor in any way suggests that broadcaster action is the equivalent of action by the government. As the court in *Post* v. *Payton*, 323 F. Supp. 799, 803 (E.D.N.Y. 1971), put it, this Court in *Red Lion*—

> "did not hold that the licensee's actions were governmental action. It merely held that a broadcast licensee's First Amendment rights were not abridged by Congress or the Commission by the application of the latter's 'fairness doctrine' or the regulations and orders promulgated thereunder."

[108] See pp. 19-20, *supra*.

of the free press, distinct from the government and protected by the First Amendment.[109]

Despite this fundamental separation of the broadcast press from the government, the court below found that "state action" was involved. It relied on three factors—(1) the licensing and regulation of broadcasters by the Commission,[110] (2) the Commission's specific acquiescence in the refusal of broadcasters to sell time for the discussion of controversial issues,[111] and (3) the "suitability" of the broadcast medium for the communication of ideas.[112] As Professor Jaffe has pointed out,[113] none of those factors can withstand scrutiny as a basis for the conclusion that state action is present in this case.

First, the existence of governmental licensing and regulation alone has never in the past been held by this Court to be a sufficient basis for a finding of state action.[114] Although such a theory has been repeatedly

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[109] *E.g.*, *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968). This fundamental principle is reflected in Section 326 of the Communications Act. See *Post* v. *Payton*, *supra*, 323 F. Supp. at 803.

[110] App. 459-61.

[111] App. 461-63.

[112] App. 463-64.

[113] Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 769-71 783 (1972). As Professor Jaffe noted (*id.* at 783):

> "We are all regulated in thousands of ways in our use of our houses and our streets . . . . Yet because we believe it to be important to distinguish the private and public spheres, our acts, our failures to act, our prejudices, and our misconducts do not become acts of government. . . . By merely tolerating my action the state does not adopt it as its own; the failure of a court to prohibit such conduct does not make it the conduct of the court."

[114] The court of appeals misread *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), in suggesting that it holds otherwise. In that case, the Court found that a restaurant leasing pub-

urged upon this Court by individual Justices in various cases,[115] and would have led to an easy resolution of the state action question in those cases, it has never been adopted.[116] Apart from the decision below, those courts which have faced the issue of whether the regulatory

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licly owned and constructed space from a governmental authority was engaged in state action because, in the light of all the facts, the state was in effect a "joint participant" in the activity. No such situation exists here. Indeed, the Congressional scheme, including Section 326 of the Communications Act, 47 U.S.C. § 326, specifically bars the Commission from jointly participating with broadcasters in the selection, preparation, and presentation of broadcast material. See also *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451 (1952), discussed below.

We note that the existence of government licensing and regulation has been argued as a ground for finding state action this term in No. 1292-71, *Moose Lodge No. 107* v. *Irvis*, *cert. granted*, 401 U.S. 992 (1971). (The decision below is reported as *Irvis* v. *Scott*, 318 F. Supp. 1246 (M.D. Pa. 1970). The case was argued on March 7, 1972.) In the *Irvis* case, the district court held that in the circumstances of that case, racial discrimination by a private club holding a liquor license was state action prohibited by the Fourteenth Amendment. The court relied on the fact that the state held a liquor monopoly and supplied all the liquor sold by the private club. In addition, the court noted that the state had asserted regulatory control over the sale of liquor, had otherwise regulated the activities of those holding liquor licenses, and had affirmatively required that "every club licensee . . . adhere to all the provisions of its constitution and bylaws" (318 F. Supp. at 1250), which in the case of this particular club required racial discrimination.

[115] See *Garner* v. *Louisiana*, 368 U.S. 157, 181-85 (1961) (Douglas, J., concurring); *Lombard* v. *Louisiana*, 373 U.S. 267, 281-83 (1963) (Douglas, J., concurring); *Reitman* v. *Mulkey*, 387 U.S. 369, 384-87 (1967) (Douglas, J., concurring).

[116] In *Bell* v. *Maryland*, 378 U.S. 226, 333 (1964), three justices dissented from the Court's refusal to reach the question of whether state action is involved in state trespass convictions of blacks for entering racially segregated private restaurants. They stated: "Businesses owned by private persons do not become agencies of the State because they are licensed; to hold that they do would be completely to negate all our private ownership concepts and practices."

scheme of the Communications Act converted broadcasters' actions into state action have held that it did not.[117]

The only cases in which this Court has held that the existence of governmental regulation in and of itself makes private action state action are ones where the government has encouraged,[118] required [119] or enforced[120] the action taken by the private party. Here, no such situation exists. Broadcasters have not sought the assistance of the Commission, or any other arm of the government, to enforce their policies concerning the sale of time. In this case, the Commission has made it clear that it was only declining to compel broadcaster action; it was not requiring or encouraging broadcasters to refuse to sell time for the discussion of controversial issues.[121] Indeed, the record does not indicate any general refusal by broadcasters to make such sales.

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[117] *McIntire* v. *William Penn Broadcasting Co., supra; Massachusetts Universalist Convention* v. *Hildreth & Rogers Co., supra; Post* v. *Payton, supra.* See also Jaffe, *The Editorial Responsibility of the Broadcaster: Reflection on Fairness and Access*, 85 HARV. L. REV. 768, 783 (1972).

[118] Such encouragement may take the form of governmental statements urging the action taken by the private party (*e.g., Lombard* v. *Louisiana*, 373 U.S. 267 (1963)); the imposition of additional burdens upon those acting in a particular fashion (*e.g., Robinson* v. *Florida*, 378 U.S. 153 (1964)); or specific authorization for the private activity (*e.g., Reitman* v. *Mulkey*, 387 U.S. 369 (1967)). See also *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451 (1952), discussed in the text below.

[119] *Peterson* v. *City of Greenville*, 373 U.S. 244 (1963); *Gober* v. *Birmingham*, 373 U.S. 374 (1963); *Avent* v. *North Carolina*, 373 U.S. 375 (1963).

[120] Cases like *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), and *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U.S. 230 (1957), hold "that to the extent that the State undertakes an obligation to enforce a private policy of racial segregation, the State is charged with racial discrimination and violates the Fourteenth Amendment." *Griffin* v. *Maryland*, 378 U.S. 130, 136 (1964).

[121] "[W]e should note that there is, of course, no Commission policy thwarting sale of time to comment on public issues." App. 265.

The court below relied on acquiescence by the Commission as its second ground for finding state action. But government "acquiescence" in the sense of failure to compel or prohibit a private course of conduct does not transform private action into state action. In such decisions as *Evans* v. *Abney*, 396 U.S. 435, 445 (1970) [122] and *Palmer* v. *Thompson*, 403 U.S. 217 (1971) [123] this Court has made it plain that it takes more than acquiescence by a government agency to make private action the action of the state. The court below neither cited nor distinguished these cases, relying instead on the earlier decision in *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451 (1952), for the proposition that agency acceptance of a private policy is the equivalent of action by the state.[124]

Pollak, while rejecting the constitutional claim on the merits, held that the provision of piped-in music to riders by a municipal common carrier constituted state action because this "service" had been specifically approved by the regulatory agency. As Justice Harlan pointed out, "state action [in *Pollak*] was explicitly premised on the close legal regulation of the company by the public utilities commission and the commission's approval of the particular action under attack." [125] The present case is clearly distinguishable.

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[122] In *Evans* the Court held that a state court could properly refuse to apply the doctrine of *cy pres* to delete a "whites only" clause in a testamentary trust. The consequence of this acquiescence by the state court was that the property automatically reverted to the heirs.

[123] In *Palmer*, the Court allowed the City of Jackson, Mississippi to surrender its lease on a swimming pool which had been operated on a desegregated basis to a private lessor (the YMCA) which operated it only for whites.

[124] App. 462.

[125] *Evans* v. *Newton*, 382 U.S. 296, 320 (1966) (Harlan, J., dissenting).

First, this case does not involve the "close legal regulation" of the private party's action that existed in *Pollak*. In that case, the agency had broad authority "to fix and enforce standards of service" for the bus company.[126] All aspects of bus company service—from rates to music—were clearly within the agency's authority. By contrast, Congress has specifically determined that broadcasters are not common carriers [127] and has barred censorship of broadcasting programming.[128] Moreover, the Commission has refrained from a detailed regulation of broadcast advertising and its unexercised power in this field does not preempt the regulatory power of state governments. *Head* v. *New Mexico Board of Examiners*, 374 U.S. 424, 429-32 (1963). We submit that the Commission's exercise of regulatory authority over broadcast advertising time similarly is not sufficiently pervasive to charge the government with responsibility for the policies of those broadcasters who decline to sell advertising time for the discussion of public issues.

Second, unlike the public utilities commission in *Pollak*, which, after extensive hearings, affirmatively approved piped-in music as in the public interest, the Commission here has not adopted the policy of any particular broadcaster as its own. It did not make any finding that a refusal by a broadcaster to sell time served the public interest. The Commission determined only that neither the Communications Act nor Commission policies required such sale, and that broadcasters remained free to sell, or not to sell, time for such purposes. If such non-inter-

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[126] *Pollak* v. *Public Utilities Comm'n*, 89 U.S. App. D.C. 94, 97, 191 F.2d 450, 453 (1951), *rev'd*, 343 U.S. 451 (1952).

[127] Section 3(h), 47 U.S.C. § 153(h).

[128] Section 326, 47 U.S.C. § 326. See also *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940), where the Court stated "the Commission is given no supervisory control of the programs, of business management or of policy."

ference by a government agency or court could convert private action into state action, any meaningful distinction between the private and governmental spheres would be entirely obliterated. Private action could be readily converted into state action by any individual whose efforts to secure administrative or judicial action against private conduct were rejected by a governmental agency or court.[129]

Finally, the court below also found state action on the ground that the First Amendment applies to any medium "suitable" for the communication of ideas, relying on this Court's decision in *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), and a related court of appeals case which has since been heard and awaits decision by this Court.[130] The court below has seriously misread this Court's *Logan Valley* decision. That case, which held that labor union picketing of a retail store within a shopping center was protected by the First Amendment, did not rest upon a finding that such a location was "suitable" for speech activities. Rather, the Court reached that result on the ground that the shopping center involved was the "functional equivalent" of a public business district which, like public streets, had been held subject to the First Amendment in *Marsh* v.

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[129] See Jaffe, *supra*, 85 HARV. L. REV. at 783; Comment, *State Action Under the Equal Protection Clause of the Fourteenth Amendment and the Remaining Scope of Private Choice*, 50 CORNELL L.Q. 473, 498-99 (1964). See also *McGlotten* v. *Connally*, 338 F. Supp. 448, 458 (D.D.C. 1972), where a three judge court stated, "To find a violation solely from the State's failure to act would, however laudably, eliminate the state action doctrine. . . ."

[130] No. 71-492, *Lloyd Corp.* v. *Tanner*, 308 F.Supp. 128 (D. Ore. 1970), *aff'd*, 446 F.2d 545 (9th Cir. 1971), *cert. granted*, 404 U.S. 1037 (1972). The court below also relied on *Diamond* v. *Bland*, 3 Cal. 3d 653, 477 P.2d 733 (1970). In both the *Lloyd* and *Bland* cases the courts held that the decision in *Logan Valley* required that shopping centers allow virtually unlimited access for speech activities. In the *Lloyd* case this Court is now considering whether *Logan Valley* extends so far.

Alabama, 326 U.S. 501 (1946). Quite evidently, a broadcast station is not the "functional equivalent" of a public business district or a public street. If anything, it is the "functional equivalent" of a daily newspaper, for it performs the same information and journalistic functions.

This functional equivalency to newspapers, however, negates a finding of state action. The cases have uniformly rejected the notion that private newspapers—which are plainly "suitable" for the communication of ideas—are the "state" for purposes of application of the First Amendment. Rather, the courts have consistently concluded that, despite the valuable communications functions which they perform, and despite the many aspects of their activities that are regulated or supported by the state, private newspapers are not the equivalent of the government and are under no affirmative obligation to accept editorial or other advertising.[131] The courts have recognized that the crucial function of the press as a critic of the state can only be performed when it is independent of the state.

Thus, the conclusion that broadcasting is a suitable and vital means of communicating ideas and informing the public does not support a finding of state action. Rather, it emphasizes the need to keep it separate from government for purposes of the First Amendment. It was to assure such separateness that Congress enacted Section

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[131] See, *e.g.*, *Associates & Aldrich Co.* v. *Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971); *Resident Participation of Denver, Inc.* v. *Love*, 322 F. Supp. 1100 (D. Colo. 1971); *Chicago Joint Board, Amalgamated Clothing Workers of America* v. *Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971). In contrast are *Lee* v. *Board of Regents of State Colleges*, 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971), and *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969), where the courts required newspapers of *state-run* schools to provide access for editorial advertising. As discused above (note 50), the *Lee* and *Zucker* cases were incorrectly decided and, in any event, are distinguishable on other grounds.

326 of the Communications Act, 47 U.S.C. § 326, barring censorship by the Commission.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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June 12, 1972

No. 71-865

JUN 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,

Petitioner,

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-865

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
Petitioner,

v.

BUSINESS EXECUTIVES' MOVE
FOR VIETNAM PEACE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 450 F.2d 642 (A. 446).[1] The opinion of the

[1] "A.___" refers to the one-volume appendix jointly filed in this case and in three other cases: *CBS* v. *Democratic National Committee*, No. 71-863; *FCC* v. *Business Executives' Move for Vietnam Peace*, No. 71-864; and *ABC* v. *Democratic National Committee*, No. 71-866. In each case review is sought of the same

Federal Communications Commission is officially reported at 25 F.C.C.2d 242 (A. 357).

JURISDICTION

The judgment of the Court of Appeals was entered on August 3, 1971 (A. 492) and a timely petition for rehearing was denied on October 4, 1971 (A. 494). The petition for a writ of certiorari was filed on January 3, 1972, and was granted by this Court on February 28, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution and Sections 3(h) and 315(a) of the Communications Act of 1934, 47 U.S.C. §§ 153(h), 315(a), which are set forth in an addendum at pp. 1a-2a, *infra*.

QUESTION PRESENTED

Whether the First Amendment requires a radio station, which provides fair and effective coverage of the diverse viewpoints on controversial public issues, to sell on demand broadcast advertising time to private individuals or groups for brief "spot" announcements asserting their views on controversial issues.

Court of Appeals' decision and the cases have been consolidated by this Court.

STATEMENT

In the decision below, a divided Court of Appeals held, over the opposition of the responsible agency, that the First Amendment compels a basic change in the methods long used by many broadcasters to inform the public. While the lower court treated the issue in comparatively abstract terms, an understanding of the actual station practices involved and the regulatory regime that governs broadcasting are essential to appreciate the context and consequences of its decision.

A. WTOP'S FAIRNESS OBLIGATION AND ITS COVERAGE OF CONTROVERSIAL PUBLIC ISSUES.

Petitioner, Post-Newsweek Stations, Capital Area, Inc. ("WTOP"), owns and operates radio station WTOP. WTOP is one of 18 radio stations located in the District of Columbia and one of 43 which serves the District of Columbia area (A. 329). Broadcast stations are subject to the Communications Act of 1934 ("the Act") and to regulation by the Federal Communications Commission, but the Act expressly states that a station is not to be deemed a "common carrier."[2]

For many years the Commission has imposed on broadcasters the dual responsibility to afford adequate coverage of public issues and to reflect the diversity of contrasting views on such issues.[3] This requirement,

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[2]Section 3(h) of the Act, 47 U.S.C. §153(h), provides, *inter alia*, that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

[3]See, *e.g.*, *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949); *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598 (1964) ("*Fairness Primer*").

known as the "fairness doctrine," has been premised on the Act's public interest standard (see Section 309, 47 U.S.C. § 309), and has received explicit congressional approval in Section 315(a), 47 U.S.C. § 315(a), which speaks of "the obligation imposed upon . . . [broadcasters] under this [Act] . . . to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." The fairness doctrine was vigorously endorsed by this Court in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), which emphasized its basic purpose of assuring that the public is properly informed.

Under the fairness doctrine, a station is expected to take affirmative steps to identify and provide balanced coverage of important public issues. *E.g., John J. Dempsey*, 6 P&F R.R. 615 (1950). The Commission's decision in *Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963), further requires that where one side of a controversial issue is aired by a station, it must broadcast contrasting views at its own expense if sponsorship is not available. The fairness doctrine is enforced through individual complaint proceedings (*e.g., Red Lion*), and the license renewal process.[4]

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[4] The Commission not only entertains objections to renewal based on fairness doctrine violations but it elicits information to determine what efforts the station makes to inform the public. For example, a renewal applicant must disclose the methods used "to ascertain the needs and interests of the public served by the station" including "identification of representative groups, interests and organizations which were consulted" to determine matters of interest to the community. FCC Form 303, § IV-A, pt. I. Programs designed to meet those needs and interests must be listed. *Id.* The applicant must also describe its news gathering staff and facilities, its public affairs programming, and its policies for making time available for the discussion of public issues. *Id.*, pt. II.

WTOP not only meets but far exceeds the requirement that due attention be given to controversial issues. Being what is popularly described as an "all-news" station, most of WTOP's program time is devoted to public affairs (A. 337). The station's coverage includes not only extensive news reporting but also commentaries, interviews and panel discussions, special events coverage, station editorials and reply editorials by private citizens and groups (see A. 313-15).[5] WTOP also broadcasts two CBS network news interview programs—*Face the Nation* and *Capitol Cloakroom*—on which national leaders regularly appear (A. 315).

WTOP strives to provide balanced coverage of the subjects it airs so that the public may be exposed to diverse views. In its news coverage, the station reports the views and activities of groups and individuals on all sides of controversial questions, as its coverage of the Vietnam war illustrates (see pp. 9-10, *infra*); with the same objective, the station seeks representatives of diverse viewpoints for its interviews and panel discussions. See p. 10, n. 13, *infra*. WTOP's regular commentators, who express their own viewpoints on controversial issues, similarly cover a broad spectrum of opinion.[6] When WTOP presents editorials on controversial issues, it seeks out responsible spokesmen to present contrasting viewpoints to be aired without charge by the station in reply

[5] WTOP is owned indirectly by the Washington Post Company, but its editorial policies are determined wholly independently of those the newspaper. See Comments of Washington Post Co., *et al.* in Docket 18110, May 17, 1971, pp. 3-4.

[6] When this case began WTOP regularly broadcast the views of four commentators reflecting their contrasting opinions on numerous issues: Carl Rowan, Drew Pearson, Rod MacLeish, and James J. Kilpatrick (A. 314).

editorials. See *Federation of Citizens Ass'ns,* 21 F.C.C.2d 12, 13 (1969).

The Commission has taken the view that, in complying with the fairness doctrine, a broadcast station should not restrict its coverage of public issues to impartial commentary but should also provide for the airing "partisan" voices.[7] WTOP's format assures that such partisan voices are repeatedly heard: through press conferences, news interviews and meetings covered in news reporting; from its independent commentators; in panel discussions and interview programs such as *Face the Nation;* and through station editorials and replies (A. 315-17).

While insisting upon strict compliance with the fairness doctrine, the Commission has stressed that it is for the broadcaster to make a "good faith exercise of his best judgment" in selecting the manner, timing and spokesmen for presenting varying points of view on controversial issues. *Fairness Primer,* 40 F.C.C. 598, 609 (1964). The overriding purpose of the fairness doctrine is "to inform the public" and secure its "paramount right to hear opposing views on controversial issues . . . ." *Id.* at 609. Accordingly, with very limited qualifications,[8] the

[7] *E.g., Storer Broadcasting Co.,* 11 F.C.C.2d 678 (1968), *aff'd sub nom. Anti-defamation League* v. *FCC,* 403 F.2d 169, 170 (D.C. Cir. 1968), *cert. denied,* 394 U.S. 930 (1969). See also *Red Lion,* 395 U.S. at 392 & n. 18.

[8] Under Section 315(a) of the Act, 47 U.S.C. §315(a), Congress has required that a station affording broadcast time to one election candidate shall, with certain exceptions, provide equal time for his opponents. In addition, regulations of the Commission (*e.g.,* 47 C.F.R. §73.123), which were approved by this Court in *Red Lion,* essentially provide that proper compliance with the fairness doctrine means that, in the cases of specified attacks on individuals and of editorials endorsing candidates, the individuals attacked and the candidates not endorsed are the proper persons to present the contrary viewpoint to the public.

Commission has repeatedly held that no individual or group has a private "right" to command the use of a station's facilities to express its views on a subject. See pp. 37-38, *infra*.

B. THE COMMISSION PROCEEDING.

In June 1969 the respondent, Business Executives' Move for Vietnam Peace ("BEM"), requested WTOP to sell it "spot" advertising time for a series of 60-second commercials conveying BEM's opposition to the Vietnam War (A. 291). These commercials, an example of which appears in the margin,[9] typically contained about 20-35 seconds of substantive argument (A. 317). In essence, all involved variations on the theme that the United States should withdraw from the Vietnam war (A. 360).

WTOP declined to accept the advertisements based on its longstanding policy not to sell spot time for the expression of personal views on controversial subjects (A. 297).[10] The policy is grounded in the station's judgment

[9] "ANNOUNCER: Rear Admiral Arnold E. True has an urgent message for you. TRUE: Much is said of an honorable end to the Vietnam War. This war is morally corrupt, politically inept, and militarily stupid. Honor is involved in getting out rather than staying in. If a man falls into a cesspool, he gets out in the most graceful and rapidest way he can. He does not stay in for honor or to save face. ANNOUNCER: The preceding public service message was brought to you by Business Executives' Move for Vietnam Peace. For your free copy of Rear Admiral True's complete statement on Vietnam, write to BEM, 901 North Howard Street, Baltimore, Maryland, 21201, or the station to which you are listening" (A. 298-99).

[10] The only exception is spots sold to candidates and for other election-related matters. Both Congress and the Commission have treated election advertising as a special category (see p. 6, n. 8, *supra*) and the Act has recently been amended to make a station's

that the public interest is best served by coverage of controversial issues, without charge, in the extensive news and public affairs programming of the station. As WTOP stated in its letter to BEM, it believes that such issues normally call for a more thorough analysis than can be provided in a spot announcement of 10, 20, 30 or 60 seconds (A. 297).[11] In addition, it considers that such spot announcements would impair its ability to maintain balanced coverage of conflicting views, by providing undue emphasis on the subjects and viewpoints of those best able to afford such advertising and by duplicating coverage of some issues while forcing the station to divert time from others warranting exposure (A. 335-37).

The same policy with respect to editorial spots is shared by other stations (see A. 251-52). Far from being a recent innovation, the view that such commercials are poor journalistic practice dates back many years.[12] Some stations do accept such editorial commercials including stations in the Washington area (A. 329). The Commission has regarded the question as one for the exercise of each station's own judgment of how best to achieve

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failure to furnish or sell reasonable amounts of time for federal candidate use a ground of license revocation. Federal Election Campaign Act of 1971, §103, 86 Stat. 3, 4.

[11] The station and guest editorials aired on WTOP run two minutes or more and other programs on controversial issues extend for as long as half an hour or more (A. 317).

[12] For example, the head of one of the networks stated to a broadcasting conference in 1937: "We sell time to sponsors solely for the advertising of their goods. We do not sell time for propaganda. . . . The sole exception we make to this policy is the sale of time to political parties during an actual election campaign." H. Skornia, *TV and Society* 30 (1965). See also E. Smead, *Freedom of Speech by Radio and Television* 48-49 (1959).

the ultimate goal of providing adequate and balanced coverage of controversial issues (A. 265).

In the present case, seven months after WTOP declined to air BEM's announcements, BEM complained to the Commission on January 22, 1970, alleging that the station had violated the fairness doctrine by devoting too much time to the administration's views on the Vietnam war and inadequately portraying the views of administration opponents (A. 291, 293). Although the *Fairness Primer*, 40 F.C.C. 598, 600 (1964), specifies that a complainant is to submit information showing "the basis for the claim that the station has presented only one side of the question," BEM never attempted to provide any such evidence. The complaint also charged that WTOP's refusal to broadcast BEM's commercials violated the public's "right to hear" and the First Amendment (A. 294-96). As relief, BEM requested the Commission to order WTOP to broadcast the commercials "free of charge" or, in the alternative, to require WTOP to sell BEM air time for the announcements (A. 296).

In subsequent submissions, WTOP showed that it had conveyed the views of a wide variety of administration critics and supporters on the Vietnam war on numerous occasions (A. 313-15). Its recent coverage included press conferences and meetings of groups opposing and supporting the war; as examples, the station cited coverage of such anti-war groups as the Vietnam Moratorium Committee, the D.C. Moratorium Committee, and the New Mobilization Committee to End the War in Vietnam, while pro-administration groups included Americans for Peace with Freedom, the Freedom Rally Committee, and the Young Americans for Freedom (A. 314-15).

Partisan voices expressing opinions on the war were heard repeatedly on the station in special events coverage

and through regular news interview programs which "consistently provided opportunities both for supporters and opponents of the President's policy" in Vietnam to express their views (A. 315).[13] Regular commentators on the station had broadcast their own diverse opinions on the subject (A. 314). WTOP's executive editor responsible for public affairs programming stated in an affidavit that the very views embodied in each of the BEM spot announcements were of his own knowledge "expressed on a number of occasions in various types of broadcasts over WTOP . . ." (A. 352).

WTOP also explained the reasons for its policy of covering controversial issues through a range of programming while declining to air spot announcements on those subjects (A. 316-17). It noted that the courts and the Commission had rejected the claims of individuals that they had a private "right of access" to require stations to broadcast their private views on controversial issues (*id.*). Although BEM invoked the people's "right to hear" and the First Amendment, citing *Red Lion* as authority, that decision described the broadcaster's obligation as one of presenting "representative" community views on controversial issues (A. 339). In addition, WTOP noted that other Washington, D.C., area stations had carried BEM's own spot announcements (A. 329).

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[13] For example, following a presidential address on Vietnam, the station broadcast comments from five pro-administration representatives and six critics of its policies, and both the supporters and opponents differed in their own opinions. The former group included Senators Goldwater, Tower and Scott and Representatives McCormack and Ford; the latter comprised Senators McGovern, Gore, Goodell, Mansfield, Aiken and Percy (A. 315).

BEM filed its last pleading addressed to the merits on April 7, 1970 (A. 353). On May 19, 1970, the Democratic National Committee ("DNC") filed a request for a declaratory ruling that "a broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues" (A. 247). Believing this request to raise issues related to BEM's own claim, the Commission withheld action in BEM's case while responsive pleadings were filed to the DNC request.

On August 5, 1970, the Commission adopted decisions in both the BEM and DNC cases (A. 357, 247), and by a six-to-one vote it rejected BEM's complaint. In the *DNC* case, the Commission by a similar vote denied DNC's request for a ruling with one qualification. Noting the special importance attached by Congress and prior Commission determinations to the viability of political parties, it held that the networks should either sell or provide free time to political parties for purposes of fund solicitation (A. 270-73).

The Commission decisively rejected the charge that WTOP's coverage of the Vietnam war had been shown to be inconsistent with the fairness doctrine. Its opinion reviewed the evidence reflecting the station's coverage of diverse and partisan opinions on the war and it noted the lack of any evidence from BEM to support a charge of unfairness (A. 360-64). [14]

[14] The Commission stated that no "undue burdens" should be placed on complainants but said there must be "some basis" for a fairness complaint before a station should be compelled to furnish a detailed refutation (A. 364). As an example, it noted that a complainant could readily monitor a few days of news or public affairs programming as a basis for its complaint (*id.*). BEM thereafter did monitor WTOP for a full day, attaching its survey to its opening brief in the lower court, but the survey merely listed

It cited its recent rejection of a fairness doctrine complaint against WTOP based upon similarly vague allegations that the station had presented only the "liberal" viewpoint on public issues (A. 363). The decision pointed out that "because of the multiplicity of spokesmen available to express views on the Vietnam war, it is obvious that a licensee must exercise its judgment in choosing appropriate spokesmen" to present conflicting views. It found no evidence that WTOP had failed to exercise a reasonable good faith judgment (A. 362). The dissenter—Commissioner Johnson—did not dispute this determination.

The Commission also rejected, with Commissioner Johnson dissenting, BEM's alternative argument that it had a right to compel WTOP to sell it time for its spot announcements even though the station had provided full and fair coverage of the varying viewpoints on the Vietnam war.[15] After reviewing the Act's history and pertinent precedents, the Commission reaffirmed that each station had the responsibility to make its own choice of speakers and formats for covering controversial issues (A. 260-69), and it declined to dictate station policy on the use of editorial commercials (A. 265). The Commission also explained how balanced coverage of the range of controversial issues could be seriously impaired if the compulsory access approach urged by DNC and BEM were adopted. It said, for example, that under this approach:

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commercials carried on the station and did not seek to demonstrate any unfairness in WTOP's coverage of the war.

[15] Most of its discussion of this claim occurred in its *DNC* opinion which the Commission expressly made applicable to the *BEM* case by cross-reference (A. 366-67).

"[T]he public's agenda for discussion of public issues would then be set substantively and increasingly by the affluent . . . . [In addition, such purchases would under the fairness doctrine themselves] impose the burden to present reasonably the other viewpoint, and in turn would inevitably cut down on the amount of time for discussion of other issues" (A. 263).[16]

As for the claim that *Red Lion* or the First Amendment required a private right to compel access, the Commission observed that *Red Lion* and other decisions of this and other courts refuted rather than supported the argument. In *Red Lion* this Court had defined the overriding "right" in broadcasting as the public's right to "suitable access to . . . ideas and experiences" (A. 366) rather than any individual's private claim to use the airwaves. WTOP thus satisfied its obligation when it provided fair and balanced coverage of conflicting views on the Vietnam war (A. 368).

C. THE COURT OF APPEALS DECISION.

Both BEM and DNC sought review of the Commission's decisions in the United States Court of Appeals for the District of Columbia Circuit. There, BEM abandoned its original claim that WTOP had failed to give fair coverage to the war and instead contended solely that the First Amendment and the public interest standard of the Act required the station to accept BEM's editorial commercials (A. 452). The lower court also treated

[16] The decision also noted that the station would lose its control over the "manner" in which it presented public issues (A. 264) and that under *Cullman* (p. 4, *supra*) the obligation to provide free reply time if necessary might affect on the station's ability to serve the public interest (A. 264-65).

DNC's appeal as directed essentially to the same kind of compulsory access demanded by BEM (A. 453). In a two-to-one decision, Judge McGowan dissenting, the court reversed the Commission.

Judge Wright's majority opinion first asserted that the action of individual broadcasters constituted state action so that the restraints imposed by the First Amendment on the Federal Government applied directly to each station. The opinion emphasized that broadcasters are licensed and regulated by a federal agency, and that broadcasting has great "importance and suitability" as a medium for the communication of ideas (A. 455-64). It rejected the contrary state action determination of three other federal courts–including the First Circuit and the Third Circuit–as representing "a crabbed judicial view" and "doctrinal impedimenta" (A. 456).

Based on its state action holding, the court of appeals then held that the First Amendment required WTOP and other broadcasters to accept editorial commercials regardless of whether the stations were providing substantial and balanced coverage of controversial issues, including "representative community views," in compliance with the fairness doctrine and *Red Lion* (A. 469-82). The court stressed the benefits of partisan commentary on controversial issues (A. 466-67) but ignored the record evidence that WTOP provides a range of partisan views on such issues. The court also asserted that the station's practice of covering controversial issues in program time while limiting spot advertisements to products and services was impermissible "discrimination" in favor of commercial messages and against controversial issues (A. 474-80).

As for the host of administrative and policy problems raised by its decision, the court directed the Commission to resolve them by promulgating "guidelines" to govern access (A. 484-86).[17] At the same time the court arrayed its opinion with warnings that various potential limitations that might be contemplated would infringe the Constitution. In particular, the court stated that the station "should not begin to exercise the same 'authoritative selection' in editorial advertising which [it] . . . exercises in normal programming" (A. 485).

In dissent, Judge McGowan pointed out that *Red Lion* refuted any claim of an "unabridgeable First Amendment" right of private individuals to broadcast and that stations are obliged by the fairness doctrine to present a fair cross section of views on controversial public issues (A. 489-90). This system of broadcasting, chosen by Congress, was "within the permissible limits of constitutional choice" and had generally proved an effective means for implementing the public's right to know (A. 490). By contrast, compulsory access invited a regime in which "money alone determines what issues are to be aired" and the majority's decision curtailed the Commission's flexibility to determine the future course of development of the fairness doctrine (A. 490-91).[18]

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[17] The problems included the application of the fairness doctrine to editorial commercials, possible requirements that such commercials be placed during popular periods of the broadcast day, measures to forestall the domination of the airwaves by those best able to afford advertising time, the permissible limits of broadcaster control over commercials that might be false or defamatory, and the use of quotas to curtail the amount of time made available for editorial advertisements (*e.g.*, A. 485).

[18] Judge McGowan drew attention to a broad-gauged investigation of the fairness doctrine begun by the Commission prior to the lower court's decision and currently under way. *Study of Fairness*

Following the lower court's decision, petitions for certiorari were filed in this Court by the Commission and the United States, by WTOP, by CBS and by ABC (see p. 1, n. 1, *supra*). The court of appeals refused to stay the effectiveness of its decision pending review in this Court. Thereafter, this Court granted the petitions for certiorari, ordered the recall of the lower court's mandate and deferred the implementation of the decision pending review.

SUMMARY OF ARGUMENT

A broadcaster who is obligated to provide the public with balanced and effective coverage of controversial issues does not violate the First Amendment by declining to sell spot advertising time to private individuals seeking to express their personal views on such issues. This Court's decisions confirm that the central purpose of the First Amendment is to maintain a "marketplace of ideas" open to the public. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). In the field of broadcasting, this end is attained when each station exercises its best journalistic judgment in furnishing "representative community views" on controversial issues in accordance with the fairness doctrine. *Id.* at 394. See *Fairness Primer*, 40 F.C.C. 598 (1964).

Unlike most other modes of expression, "radio inherently is not available to all . . . . [and thus] some who wish to use it must be denied." *NBC v. United States*, 319 U.S. 190, 226 (1943). In broadcasting, therefore, private claims are subordinate to the public's interest in "access

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Doctrine, 30 F.C.C.2d 26 (1971). Among the many issues the Commission said it would consider in that proceeding was whether some method of "access" would be desirable and workable. *Id.* at 33. See p. 44, *infra*.

to . . . ideas" (*Red Lion*, 395 U.S. at 390) and freedom of speech does not mean that any private individual may insist that a broadcaster carry his own message. *E.g.*, *McIntire v. Wm. Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946). The lower court's approach would, in fact, disserve First Amendment interests by giving undue influence to the wealthy in choosing the issues for discussion in broadcasting and by interfering with the operation of the fairness doctrine. It would also entail increasing and pervasive control by the government of what may and may not be said in the broadcast media.

The decision below imposes a constitutional strait jacket on broadcast regulation and is squarely inconsistent with the statutory plan devised by Congress. The Communications Act provides that broadcasters shall not be deemed "common carriers" (Section 3(h), 47 U.S.C. § 153(h)), and Congress in framing the predecessor statute considered and rejected a proposal requiring broadcasters to provide access on demand for individuals to address public issues covered by the station. See 67 *Cong. Rec.* 12503 (1926). The decision to impose responsibility for selecting speakers and formats on each broadcaster, rather than to employ a common carrier scheme, is a constitutionally permissible choice for Congress. Judicial interference with that choice is especially inappropriate because Congress has maintained continuing oversight (*e.g.*, Federal Election Campaign Act of 1971, 86 Stat. 3) and technological developments require flexibility instead of freezing communications policy in a constitutional mold.

The Commission amply justified its refusal to dictate station practice with regard to editorial commercials. Legislative history and legal precedent affirm that sta-

tions have broad discretion in selecting the manner of informing the public, and the Commission considered that to require editorial spots would impair the operation of the fairness doctrine and defeat the public interest. The lower court's contrary decision compels the Commission to embark on a complex regulatory adventure, which includes establishment of "guidelines" and presages continuous administration of the court's access scheme. This mandate usurps the authority of the responsible agency just as it is currently undertaking a general review of the interrelated problems of fair coverage and considering its own solutions. *Study of Fairness Doctrine*, 30 F.C.C. 2d 26 (1971).

WTOP's decision to present controversial issues through a range of programming rather than editorial commercials is a reasonable journalistic judgment well within its lawful discretion as trustee for the public interest. A station may reasonably conclude that 60-second spots on controversial questions are too short to attain real benefits and that, by upsetting the balance in subjects and diverting additional time for replies, such editorial commercials will hinder the full and fair coverage of public issues. WTOP's policy involves no invidious discrimination; its different treatment of public issues and product commercials is not only rationally justified but works to promote the public's right to know. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

The lower court also erred in holding that WTOP's policy respecting editorial advertisements, which was neither instigated nor compelled by the Commission, constituted state action. Congress did not make broadcast stations instrumentalities of the Federal Government, as two other circuits have affirmed (*e.g.*, *McIntire v. Wm.*

Penn Broadcasting Co., supra), and nothing in this Court's state action decisions warrants a contrary result. Extension of the state action concept to broadcaster decisions, already subject to Commission regulation, would simply require the courts perpetually to decide questions of communications policy on constitutional grounds. This extension would also undermine the desirable separation of government and the media including newspapers and, as the vehicle of further restraints on journalistic judgment, would impair the interests of free speech. II Z. Chafee, *Government and Mass Communications* 707-10 (1947).

ARGUMENT

I. BROADCASTERS ARE OBLIGATED TO PROVIDE BALANCED COVERAGE OF DIVERSE VIEWS ON CONTROVERSIAL PUBLIC ISSUES THROUGH NORMAL PROGRAMMING AND ARE NOT REQUIRED BY THE FIRST AMENDMENT TO SELL SPOT ADVERTISING TIME TO PRIVATE INDIVIDUALS OR GROUPS TO EXPRESS THEIR PERSONAL VIEWS.

A. The First Amendment Interest in Broadcasting Is Served by Allowing Independent Stations To Present Representative Community Viewpoints on Controversial Issues.

The First Amendment provides in relevant part that "Congress shall make no law . . . abridging freedom of speech . . . . " Even on the challenged assumption that the station is engaged in state action and stands in the shoes of Congress (see pp. 52-62, *infra*), WTOP in no way infringed this prohibition for, judged by the ultimate

touchstone of constitutional purpose,[19] the station's fair coverage of diverse views and contentions secures the paramount First Amendment stake in broadcasting—the public's right to know.

As this Court has repeatedly stated, the central purpose of the First Amendment is to preserve a "marketplace of ideas" for the American people.[20] Assuring that the full spectrum of ideas and opinions are available to the public is basic to democratic self-government (*e.g.*, *Mills v. Alabama*, 384 U.S. 214 (1966)), and is conceived as a condition of civilized life and progress in our society. T. Emerson, *The System of Freedom of Expression* 6-9 (1970). Thus, the thrust of the constitutional guarantee of free speech is directed to safeguarding the public's interest in ideas.

Any suppression of *ideas* is therefore severely confined by the First Amendment even in the face of great national interests (*e.g.*, *New York Times Co. v. United States*, 403 U.S. 713 (1971)), while reasonable limitations on the time, place or manner of speech are well established for myriad public purposes.[21] "What is essential is not that everyone shall speak, but that everything worth saying shall be said." A. Meiklejohn, *Political Freedom* 26 (1948). Consonantly, this Court's

[19] See *Red Lion*, 395 U.S. at 390-92; *United States* v. *Classic*, 313 U.S. 299 (1939); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

[20] *E.g.*, *Red Lion*, 394 U.S. at 390; *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). See *Whitney* v. *California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring); *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[21] *E.g.*, *Adderley* v. *Florida*, 385 U.S. 39 (1966); *Cox* v. *Louisiana*, 379 U.S. 559 (1965); *Beard* v. *Alexandria*, 341 U.S. 622 (1951); *Kovacs* v. *Cooper*, 336 U.S. 77 (1948).

leading opinion defining the First Amendment interest in broadcasting affirmed the public's right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . . . " *Red Lion*, 395 U.S. at 390.

The objective of public "access" to representative views on significant issues is achieved in broadcasting by the operation of individual stations within the framework devised by Congress and administered by the Commission. Under the statutory plan, Congress has entrusted thousands of broadcasters with the responsibility, free from the stifling effect of government domination, to assure that the public is fully and fairly informed. See pp. 34-38, *infra*. These independent stations and the many individual, often partisan voices that speak through them provide a wide diversity of ideas and opinions to the public on a vast range of controversial issues.

The public's exposure to conflicting views and partisan voices is further secured by the fairness doctrine and ancillary requirements enforced by the Commission. These obligations require, as this Court said in *Red Lion*, "that discussion of public issues be presented on broadcast stations and that each side of those issues must be given fair coverage." 395 U.S. at 369. They also call for affirmative measures by each station to attain this goal of public exposure, including the presentation of speakers committed to contrasting positions. See p. 6, *supra*. If a station fails to meet these obligations the available sanctions include the most severe measures possible: revocation or non-renewal of a broadcaster's license. Sections 308-09, 312, 47 U.S.C. § § 308-09, 312.

Subject to these obligations, each station exercises an essentially journalistic function in planning its own

programming. Thus, WTOP must select and balance subjects, formats, and speakers for the very purpose of assuring that a significant variety of different important issues and competing viewpoints are effectively presented; indeed, the necessity of responsible choice cannot be avoided since the demand for broadcast time is greater than its supply. Under the fairness doctrine, however, WTOP is not entitled to exclude any viewpoint from the air because WTOP disagrees with it, because it is unpopular, or because the station believes it to be iniquitous.[22]

As the dissenting judge observed below, the regime of independent stations subject to the fairness doctrine has in general effectively served "the public's right to know," and the loudest complaints of broadcasters' coverage of public issues has been from those who find them too effective (A. 480). The range and vigor of broadcast reporting and commentary on such issues, including the Vietnam war, is amply documented; and responsive criticism by officials whose policies are subject to scrutiny confirms the need for broadcaster independence.[23] Nothing in the present case suggests that the

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[22] The Commission said long ago that stations are required to cover public issues under the fairness doctrine "without regard to personal views and opinions of the licensee on the matter or any determination by the licensee as to the possible unpopularity of the views to be expressed on the subject matter to be discussed among particular elements of the station's listening audience." *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1250 (1949).

[23] See generally M. Arlen, *The Living-Room War* (1969); Alfred I. duPont–Columbia University, *Survey of Broadcast Journalism* 1969-1970, at 31-45, 67-80, 112-121 (1970); *id.* 1970-71, at 7-61 (1971).

existing design of broadcasting is inadequate to assure a "marketplace of ideas" for the public.

The record here shows that WTOP devoted substantial time to Vietnam war policy as an important subject of public concern, and it was discussed in many formats from hard news to interviews to special event coverage. The station strived to assure balanced coverage; it reported the activities and meetings of both anti-war and pro-administration groups; it presented in debates and interviews congressional and other spokesmen holding widely differing views; and its own commentators reflected a range of opinions about the war. See pp. 9-10, *supra*. The evidence refutes any claim that the subject of the war or BEM's viewpoint on it was scanted by the station, and BEM has itself abandoned its charge that the fairness doctrine was violated.

WTOP's coverage of the war issue was not confined to impartial or detached analysis; it has repeatedly provided time for individuals to express their own views on the matter. Zealous advocates of different positions on the war made their arguments through press conferences, speeches, interviews and panel discussions. *E.g.*, p. 10, n. 13, *supra*. No debate on Vietnam war policy could be conducted in a manner more "uninhibited, robust and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

It would be incredible on the present record to suggest that the broadcast public has been deprived of effective "access to . . . ideas" advocated by BEM. Their substance is the staple of arguments on the Vietnam war that have echoed through the country for years and have been carried by WTOP and countless other stations. In fact, "each of the viewpoints embodied in the BEM announce-

ments has been expressed on a number of occasions in various types of broadcasts over WTOP by critics of the Vietnam War . . . " (A. 352). No evidence to the contrary has ever been submitted by BEM in this case.

Thus, independent station responsibility, coupled with the fairness doctrine, serves the purpose of the First Amendment to ensure public exposure to the full range of competing viewpoints on important issues. See *Red Lion*, 395 U.S. at 390-94. WTOP's coverage of the Vietnam war debate portrays the fair and effective coverage that results from this congressional and administrative plan. Constitutional objectives are not frustrated by the plan or by WTOP's policies—they are achieved; and this overriding fact is fatal to any charge of constitutional violation.

B. There Is No Private Constitutional Right Requiring Stations To Sell Time to Individuals To Assert Personal Views on Controversial Issues Subject to the Fairness Doctrine.

BEM has asserted that private individuals and groups possess a constitutional "right of access" to the airwaves and the lower court has held that such an "abridgeable" right exists (A. 467). WTOP, as the fairness doctrine requires, already provides access for competing ideas, including BEM's own viewpoint. By airing partisan voices in news, interviews, special events coverage, debates and other programming, the station also provides access for individuals to be heard. Thus, what BEM claims is the right to compel a broadcaster to carry the views of particular speakers on a particular subject in a commercial spot format, regardless of the issue, regardless of other issues competing for attention, and regardless even

of prior coverage of the same views on the same issue. Decisions applying the First Amendment in the context of broadcasting have decisively rejected such a claim.

The dominant characteristic of broadcasting is its limited capacity: available spectrum space can accommodate only a certain number of stations and there is a maximum number of hours in each broadcast day. As this Court said in *NBC v. United States*, 319 U.S. 190, 226 (1943), "unlike other modes of expression, radio inherently is not available to all. . . . Because it cannot be used by all, some who wish to use it must be denied." It has thus long been settled that Congress and the Commission may reasonably regulate this scarce resource to achieve the greatest benefit for the public as a whole.[24]

The similar teaching of *Red Lion* is that private claims to the operation or use of a broadcasting facility are subordinated to the "paramount" public interest, whether those private claims are advanced on behalf of "individuals who want to broadcast" or by the broadcasters themselves. 395 U.S. at 389-90. Upon this principle, this Court has tolerated regulation of broadcasters' programming that in most other media would be swiftly rebuffed by the First Amendment. No newspaper needs to submit its format to agency scrutiny and a soapbox speaker is not obliged fairly to present conflicting viewpoints.[25] The same subordination to the public

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[24] *E.g., Radio Comm'n* v. *Nelson Bros. Co.*, 289 U.S. 266 (1933); *KFKB Broadcasting Ass'n* v. *Federal Radio Comm'n*, 47 F.2d 670 (1931). See generally W. Emery, *Broadcasting and Government* 13-53 (1971).

[25] See generally Note, "Regulation of Program Content by the FCC," 77 *Harv. L. Rev.* 701 (1964); *Report on Programming Policy*, 20 P&F R.R. 1901, 1915-16 (1960); *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1253 (1949).

interest applies equally to private individuals who are not broadcast licensees. The First Amendment, as construed by this and other courts, confers on such persons no private right to command the use of a radio station carrying out its mandated duty to inform the public.

This Court said in *Red Lion* that "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." 395 U.S. at 388. There is nothing new or remarkable in this conclusion; the decision authoritatively restates what the Third Circuit said many years ago when it rejected a claim comparable to BEM's and concluded that freedom of speech "does not mean . . . that . . . [an individual] may seize a particular radio station for his forum."[26] Neither Congress nor the Commission has ever accepted the notion of a private constitutional "right of access" of the kind premised by BEM and the lower court. See pp. 34-38, *infra*.

Since this Court has defined the public's interest in broadcasting as "access to . . . ideas" and the Commission has secured that interest through the fairness doctrine (see pp. 3-7, *supra*), it is beside the point that compulsory access of some kind may be called for or permitted in other modes of expression and other contexts. In

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[26] *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F.2d 597, 601 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946). More recently, the Court of Appeals for the District of Columbia Circuit stated: "No individual member of the public has a right of access to the air; the licensees may exercise their judgment as to what matter is presented and by whom." *Green* v. *FCC*, 447 F.2d 323, 328 (1971). See also *Chicago Joint Board* v. *Chicago Tribune*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971) ("free speech does not give [the complainant] . . . the right to make use of the [newspapers'] . . . printing presses" without their consent).

supporting its position, the court below placed great weight on decisions in other inferior courts recognizing a private "right of access" in various situations involving subway and bus posters, leaflets in transport terminals, and advertisements in public school newspapers.[27] Whether or not these cases were rightly decided, they are plainly distinguishable: while in each instance no provision had been made to secure the public's right to be informed on public issues—indeed, controversial subjects were generally barred from the forum—in broadcasting Congress and the Commission have taken comprehensive measures to provide for fair presentation of the range of views on important public issues.

This Court has repeatedly emphasized that the bearing of the First Amendment on an individual medium or forum depends on its nature, the historical traditions associated with it, the regulatory regime to which it is subject, and the accommodating of free speech with other values. Particular cases are not resolved by generalities regarding "forums for communication" (A. 476). Each mode or place of expression—from streets to movie theatres to courtrooms—presents "its own peculiar prob-

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[27] *E.g.*, *Wirta* v. *Alameda-Contra Costa Transit District*, 434 P.2d 987 (Calif. 1967) (busses); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (S.D. N.Y. 1967) (subway station); *Lee* v. *Board of Regents*, 306 F. Supp. 1097 (W.D. Wis. 1969) (school newspaper); *In re Hoffman*, 434 P.2d 353 (Calif. 1967) (railroad depot). These and similar cases are distinguishable from the situation in broadcasting, quite apart from the absence of any fairness obligation in those cases, because in almost every instance public instrumentalities or public places were involved. See pp. 52-62, *infra*.

lems." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).[28]

Since there are more individuals who want to broadcast than there are frequencies to accommodate them, in each instance someone must bear the responsibility for their effective use. Under the Act, that responsibility rests with individual broadcast stations which are subject to a statutory obligation to inform listeners about controversial issues of public importance. Congress' choice among regulatory patterns, where one must necessarily be chosen, is well within its constitutional competence. See pp. 34-40, *infra*.

Accordingly, when the lower court talks of an "abridgeable" right of access subject to Commission guidelines (A. 467, 485), the actual consequence is merely a transfer of authority, which presently resides in the stations acting on behalf of the public, to wealthy private parties and groups subject to no such obligation and to governmental regulators who pose their own dangers to free speech. The First Amendment *ex proprio vigore* does not compel such an adjustment which will impair rather than promote the public's right to know.

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[28] See, *e.g.*, *Estes* v. *Texas*, 381 U.S. 532 (1965); *Cox* v. *Louisiana*, 379 U.S. 559 (1965); *Freedman* v. *Maryland*, 380 U.S. 51 (1965). As another court put the matter, rejecting an alleged "right of access" to compel a law journal to publish an article, "the right to freedom of speech does not open every avenue to one who wishes to use a particular outlet for expression." *Avins* v. *Rutgers*, 385 F.2d 151, 153 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

C. A Compulsory Access Regime Will Disserve First Amendment Interests by Impairing Balanced Coverage of Issues and Increasing Government Intervention in Broadcasting.

The manifest impact of the lower court's access regime, if it were ever implemented, would be substantially to increase the influence of wealth in determining what is broadcast. At present, the ability of private interests to mount propaganda campaigns through broadcasting is severely limited because many stations like WTOP decline to sell advertising time for such a purpose. The lower court's decision would require these stations to abandon their existing policies and would thus magnify the advantage already possessed in other spheres by those whose pocketbook is deepest.

Even the court below recognized that it would not serve the public interest in free speech if "a few individuals or groups might come to dominate editorial advertising time" (A. 484-85) and if the airwaves came to be controlled "by only one group from one part of the political spectrum" (A. 485).[29] What the opinion aptly called "a onesided flood of editorial advertisements" (*id.*) would hardly enhance the public's right to know and this Court's own decisions reflect a condign hostility to the "monopolization" of broadcasting by which private

[29] Experience in other countries, and occasional incidents in this one, serve to remind how broadcasting may be misused in this fashion. *E.g.*, H. Childs & B. Whitton, *Propaganda by Short Wave* 49-108 (1942); A. Schlesinger, *The Politics of Upheaval* 16-28 (1960). See generally F. Irion, *Public Opinion and Propaganda* 478-80 (1950): "[Radio] is a superb tool for the agitator, whatever his cause. If it were not for the cost of time on the air and for the numerous restrictions imposed by the radio industry, the agitator would have a field day."

interests expressing their own narrow views drown out the voices of those with whom they disagree. See *Red Lion*, 395 U.S. at 392; *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

The fairness doctrine, invoked by the lower court as an answer to such objections, is more likely to aggravate the harm done by its decision in another way. It is true that a broadcaster might attempt to provide some counterweight to a "onesided flood of editorial advertisements" by presenting contrary viewpoints through other programming. This, however, works its own harm since time would then be diverted from some other subject the broadcaster seeks to cover. The Commission aptly illustrated the point:

> "[S]ince the licensee must afford reasonable opportunity for discussion of both sides, the purchase of substantial blocks of time for a campaign by, say, the oil industry to discuss the issue of the oil depletion allowance would impose the burden to present reasonably the other viewpoint . . . . [W]e believe that such allocations of limited time are to be made on the basis of the *public* interest—not that of any private group, however powerful or affluent" (A. 263-64).

Thus, applying the fairness doctrine to offset any effects of editorial advertising—and the offset can only be partial at best—merely permits a system in which "the public's agenda for discussion of public issues . . . [is] set substantively and increasingly by the affluent . . . " (A. 263).

There is no reason to assume that those best able to afford editorial advertising time are better equipped to strike a balance among subjects of concern to the public than broadcasters operating subject to the fairness doctrine and the license renewal process. The broadcaster is

under an obligation to see that significant and controversial matters are aired; the editorial advertiser, by contrast, may dwell at will upon subjects slight, parochial or inappropriate. The history of demands for air time does not foster confidence in a laissez-faire approach to broadcast programming.[30]

In addition, the lower court's decision is bound to enhance dangerously the control exercised by the government over exactly what is said or not said over the airwaves. The opinion below itself concedes that guidelines prepared and adminstered by the Commission will be necessary to implement its compulsory access regime. It understates, however, the scope and permanence of the governmental intervention and it ignores the pernicious consequences for First Amendment interests.

From the lower court's own opinion it is apparent that it expects the Commission to reach and resolve such questions as when a broadcaster may or should exclude an editorial advertisement because its content is grossly false and misleading (A. 473); whether "representatives of one particular narrow viewpoint" have had enough to say (A. 485); and when a subject or opinion should be aired (see A. 484). Indeed, these are merely examples of numerous issues that the government can hardly avoid facing if it is to impose a compulsory access regime while

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[30] See, *e.g.*, letter to Mrs. Alexandra Mark, FCC 72-278, March 23, 1972, concerning a ruling *inter alia* on "paid advertisements promoting astrology"; letter to The Committee of One Million, FCC 71-1096, Oct. 22, 1971, concerning a demand to purchase time for "a one hour documentary film entitled, 'U.S. China Policy: Danger at the Crossroads' "; letter to Communications Workers of America, FCC 71-832, Aug. 6, 1971, concerning a demand to purchase time for messages to the union members on "contract ratification."

maintaining order on the airwaves. See p. 42, n. 42, *infra*. Yet it should be obvious above all else that under the First Amendment the government ought not be deciding when "one narrow viewpoint" has had its say. "[E]xpressly applying this county's tradition of free expression to the field of radio broadcasting, Congress has from the first emphatically forbidden the Commission to exercise any power of censorship over radio communication." *Farmers Union v. WDAY*, 360 U.S. 525, 529-30 (1959).

Today, thousands of station managers, commentators, interviewees, news reporters, editorialists, and individuals in the news create a "marketplace of ideas" by their separate choices and decisions made in the process of broadcasting. It will not advance free speech interests in broadcasting for a government agency to make such determinations for all stations through uniform guidelines or on any other basis. Five stations in the Washington area did carry BEM's advertisements (A. 329); one may speculate whether it would have fared so well if a government agency were deciding whether its viewpoint had already been given adequate exposure.

The government's overshadowing role in instituting such guidelines would be perpetuated in their administration. Within the framework of guidelines, questions of dominance, falsity, permissible limits on subject matter and the like would necessarily recur on a situation by situation basis and the Commission would be compelled to play a continuing role in resolving disagreements between the stations and editorial advertisers over particular advertisements. Vigorous and independent broadcasting is not likely to be enhanced by this process.

In a number of contexts, this Court has remarked on the "chilling effect" on First Amendment interests posed

by excessive government oversight,[31] and Congress and the commentators have been equally aware that "the line between regulation and censorship is a thin one."[32] On occasions the constraints on broadcasters may be unavoidable, although as this Court noted in *Red Lion*, it would be better if even the fairness doctrine itself were not necessary. 395 U.S. at 393. As those constraints multiply, the danger increases to the very interests the lower court seeks to protect.

No one can measure in advance the precise harm that compelled access would cause to the cardinal aim of full and fair information to the public; but certainly the threats posed—of offering undue influence to powerful interests, of distorting the public's agenda for discussion, and of increasing government regulation of broadcasters—are not chimerical. To say that the First Amendment compels these hazards to be suffered—and irreversibly so since by a constitutional command—is not a tolerable construction of the Constitution.

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[31] *Sheldon* v. *Tucker*, 364 U.S. 479 (1960); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963); *Red Lion*, 395 U.S. at 393-94.

[32] H. Rep. No. 91-257, 91st Cong., 1st Sess. 3 (1969). "It is, however, naive in the extreme to suppose that government supervision, through the fairness doctrine or other means, would ultimately promote hetrodoxy. . . . [G]overment intervention in broadcast programming has in fact been a major impetus toward conformity and orthodoxy." Robinson, "The FCC and the First Amendment," 52 *Minn. L. Rev.* 67, 162 (1967). See also Kalven, "Broadcasting, Public Policy and the First Amendment," 10 *J. of Law & Econ.* 15, 46-48 (1967).

II. THE COMMISSION'S DECISION ACCORDS WITH STATUTORY INTENT AND REPRESENTS A RATIONAL AGENCY JUDGMENT ON A QUESTION OF POLICY.

A. In Regulating Broadcasting Congress Permissibly Chose a System of Independent Broadcasters Rather Than a Common Carrier Regime.

In framing the Communications Act, Congress chose to make each broadcast station responsible, subject to reasonable regulation, for determining how its broadcast facilities should be used, and it deliberately rejected the kind of access regime which the lower court has imposed. This long-respected legislative judgment not only confirms that the Commission correctly parsed the governing statute but weighs heavily against the lower court's constitutional determination.

When Congress designed a regulatory regime for broadcasting it might, as Judge McGowan stated below, have provided for "public ownership and operation of radio and television communications facilities" similar to that in other countries (A. 490). Or, it could have treated broadcasters as "common carriers" required to air messages and programs of all comers on a first-come, first-served basis. Instead, Congress chose to maintain the then-existing pattern of individual station responsibility, and it superimposed a statutory regime of licensing and reasonable regulation by the Commission. See W. Emery, *Broadcasting and Government* 27-44 (1971).

Congress therefore structured the Radio Act of 1927, 44 Stat. 1162—the model for Title III of the present Act (see p. 36, *infra*)—not to regulate broadcasters as common carriers but to preserve their autonomy and

competiton amongst them.[33] The statute contemplated numerous stations subject to the antitrust laws, provided for licensing but prohibited agency censorship, and eschewed the pervasive business and rate regulation applied to utilities and carriers. See 44 Stat. 1162, 1166-70. Subject to limited statutory and agency-created exceptions, "the licensee of a radio station chooses its own advertisers and its own program . . . ." *Pulitzer Pub. Co. v. FCC, supra*, 94 F.2d at 251. *Accord, Regents of New Mexico College v. Albuquerque Broadcasting Co.*, 158 F.2d 900 (10th Cir. 1947).

At the same time Congress explicitly rejected the concept that a broadcast station should be required to afford a right of compulsory access for individuals wishing to express their personal views on matters of public importance. As it emerged from the Senate Committee, the bill which became the Radio Act of 1927 contained an explicit provision that:

> "[I]f any licensee shall permit a broadcasting station to be used . . . [to broadcast any matter for a valuable consideration], or by a candidate or candidates for any public office, or *for the discussion of any question affecting the public*, he shall make no discrimination as to the use of such broadcasting station, and *with respect to such matters the licensee shall be deemed a common carrier in interstate*

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[33] See *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940); *Red Lion Broadcasting Co.* v. *FCC*, 381 F.2d 908, 928 (D.C. Cir. 1967), *aff'd*, 395 U.S. 367 (1969); *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946); *Pulitzer Pub. Co.* v. *FCC*, 94 F.2d 249 (D.C. Cir. 1937).

commerce: *Provided*, that such licensee shall have no power to censor the material broadcast."[34]

On the floor of the Senate this section was revised to eliminate this broad statutory obligation after a substantial policy debate.[35] Highlighting the specific character of the change wrought by the Senate is the fact that the revised section continued to provide a right of access, based on the principle of equal opportunity, in the narrow instance of elections. See Radio Act of 1927, §18, 44 Stat. 1162, 1170.

In 1934 the structure provided by the 1927 statute was carried forward almost intact to Title III of the present Act. See *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). Although attempts were again made to institute a common carrier obligation to provide private access, Congress declined to enact any of these proposals. See, *e.g.*, S. 6, 71st Cong., 1st Sess. (1929); H.R. 7986, 73d Cong., 2d Sess. (1934). Instead, Congress added Section 3(h) of the Act, 47 U.S.C. §153(h), explicitly confirming that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

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[34] See 67 *Cong. Rec.* 12503 (1926) (emphasis added); S. Rep. No. 772, 69th Cong., 1st Sess. 4 (1926). See generally Manelli, Legislative History of the Fairness Doctrine (1968), reprinted in *Hearings on the Fairness Doctrine Before the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. (1968).

[35] Senator Dill, a major architect of the statute, objected to the common carrier obligation precisely because of the restraints it placed on the flexibility and discretion of the station. 67 *Cong. Rec.* 12503 (1926). See also 67 *Cong. Rec.* 12501-03 (1926).

Agency interpretations of the Act have reflected this principle of broadcaster responsibility virtually from the outset. For example, in *U.S. Broadcasting Co.*, 2 F.C.C. 208, 225 (1935), the Commission stated:

> "The right to determine, select, supervise, and control programs is inherently incident to the privilege of holding a station license. In fact, the right becomes a responsibility of a licensee, as he must be held to strict accountability for the service rendered."

Accord, Report on Programming Policy, 20 P&F R.R. 1901, 1908 (1960). Conversely, the Commission has repeatedly denied claims that private individuals have a right to compel stations to provide them with broadcast time on issues fully and fairly covered by the stations.[36] For, as the Commission has said, the governing precept is the "right of the public to be informed, rather than any right on the part of . . . any individual member of the

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[36] *E.g.*, letter to Washington Women's Strike for Peace, Nov. 22, 1965 (see A. 366); *Mrs. Madalyn Murray*, 40 F.C.C. 647 (1965); *Democratic State Central Committee of California*, 19 F.C.C.2d 833 (1968). BEM has relied upon *United Broadcasting Co.*, 10 F.C.C. 515 (1945), as representing a contrary view. There, a broadcaster purported not to sell time for controversial issues but allegedly applied that policy "strictly" to those whose views the station disapproved and "loosely or not at all" with respect to views it favored. *Id.* at 515. The decision, which occurred before the fairness doctrine was fully enunciated, readily squares with the underlying obligation of fair treatment for competing views (see *Red Lion*, 395 U.S. at 377). If BEM's construction were taken, the decision could not be more than an eccentric departure from an otherwise uniform line of Commission pronouncements.

public to broadcast his own particular views on any matter . . . ."[37]

This longstanding administrative construction of the Act is virtually contemporaneous with the Act itself. As the considered view of the agency charged with the statute's execution it is entitled to great respect. *E.g., Udall* v. *Tallman*, 380 U.S. 1 (1965); *Red Lion*, 395 U.S. at 381. Coinciding with statutory language and legislative history, the agency construction confirms that Congress did not impose any general access obligation on broadcasters but, on the contrary, deliberately rejected such an approach.

The lower court's decision holds in substance that the course ordained by Congress and consistently followed by the Commission for more than a quarter century is unconstitutional. Yet *Red Lion* itself shows that, so long as the public is informed, the pattern of broadcasting regulation is a matter for legislative and agency judgment. The broad phrases of the First Amendment may define the goal as the public's right to know (395 U.S. at 390) but they do not provide a blueprint that withdraws from Congress and the Commission the choice of prescribing the means, as judgment and experience may advise.

In advancing the public's right to know in broadcasting, none of the alternative patterns is without its benefits and drawbacks. Every alteration in the delicate balance established by the present Act—among govern-

[37] *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1249 (1948). The commentators have shared the same understanding. *E.g.*, Loevinger, "Free Speech, Fairness, and Fiduciary Duty," 34 *Law & Contemp. Prob.* 278, 297 (1969): "It is all viewpoints that are entitled to be heard, not all individuals or all spokesmen, except in the cases, specified by statute or a rule . . . ."

ment supervision, broadcaster discretion, and the participation of partisan voices—may more easily impair free speech than promote it. See generally II Z. Chafee, *Government and Mass Communications* 707-10 (1947). Where Congress and the responsible agency have struck one balance rather than another this Court has repeatedly cautioned against the temptation of judges to become "super legislatures," whether under the aegis of the Constitution or through conventional judicial review.[38]

A judicial reluctance to intervene is still more appropriate since the Congress and agency have maintained a continuing "grip" on the development of broadcasting. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). Here, both have continued to provide oversight, considering proposals and instituting new requirements bearing directly on free speech interests in broadcasting.[39] Finally, electronic communication is today in a period of unprecedented flux as the potentials of the field are stretched by CATV and satellite broadcasting. This is precisely the wrong time for the lower court to freeze broadcasting into a particular posture by imposing what Judge McGowan aptly described as a "consti-

[38] *Fergusen* v. *Skrupa*, 372 U.S. 726, 731 (1963); *Daye-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423 (1952). See also *American Lines* v. *Louisville & N. R.R.*, 392 U.S. 571, 592-93 (1968); *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952).

[39] For example, Congress has several times revised the Act to give statutory recognition to the fairness doctrine, amend the equal time requirement, and for other ends. *E.g.*, 66 Stat. 717 (1952 amendments); 73 Stat. 557 (1959 amendments); 86 Stat. 3 (1972 amendments). On the other hand, Congress has continued to reject proposals to impose a compulsory access obligation on stations. *E.g.*, H.R. 3595, 80th Cong., 1st Sess. (1947); H.R. 6949, 81st Cong., 2d Sess. (1950). As for the Commission measures, see p. 41 & n. 41, *infra*.

tutional strait jacket" on the regulatory program (A. 491).

B. The Commission Amply Justified Its Refusal To Dictate Station Policy on Editorial Advertisements.

In deciding whether an agency decision conforms to statutory intent and is a rational exercise of judgment, this Court has repeatedly stressed the deference due to the Commission when it determines that a given course represents the public interest.[40] What the precedents require is that the agency take account of the relevant considerations and provide a reasoned explanation for its result. In passing on BEM's complaint and DNC's request for ruling, the Commission amply justified its decision not to interfere with the independent judgment of broadcasters by requiring them to accept editorial advertisements.

In its opinions, the Commission reviewed how the fairness doctrine operated to assure that diverse views on controversial issues are laid before the public (A. 257-59). It considered the limitations of 60-second spots in contributing to public understanding on such issues (A. 264). It was properly concerned that the balance of programming could be "drastically skewed" by compulsory access (A. 263) and it identified other ways such a scheme might impair the fairness doctrine and the

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[40] *Red Lion*, 395 U.S. at 381; *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *NBC* v. *United States*, 319 U.S. 190 (1943). "Courts are slow to interfere with [the Commission's] ... conclusions when reconcilable with statutory directions." *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956) (footnote omitted).

ability of stations to operate in the public interest (A. 264-65).

The Commission also gave due emphasis to the broadcaster's responsibility, imposed by the Act and long acknowledged by the Commission, to make its own judgments about the kind of broadcasting that will best serve its own listeners (A. 261-65). Diversity and independence themselves contribute to First Amendment interests, and the Commission made clear that each station may choose its own course on editorial advertising (A. 265). Lastly, the Commission noted the possibility of providing access channels through CATV systems where the inherent scarcity limitations of broadcasting do not apply (A. 266).

In applying the public interest standard of the Act, the Commission in no sense ignored First Amendment interests. Its opinions here reflect explicit concern for the operation of the fairness doctrine, for broadcaster independence, and for securing individual access through less disruptive means such as CATV. In other contexts, too, the Commission has repeatedly recognized these values by implementing measures which, whatever their individual wisdom, were specifically directed at fostering free speech interests in broadcasting.[41]

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[41] Apart from CATV access just noted and the fairness doctrine study (p. 44, *infra*), recent examples include rules limiting television network syndication practices and reserving 25 percent of prime time for non-network programs (47 C.F.R. §§ 73.658(j), (k)) and the personal attack and candidate endorsement rules upheld in *Red Lion*. *E.g.*, 47 C.F.R. §73.123. Of much longer standing are the Commission's chain broadcasting rules and the multiple ownership rules. *E.g.*, 47 C.F.R. §§ 73.131, 73.240. FM radio and UHF television were themselves fostered by the Commission to promote "a multitude of voices" (A. 265).

By any conventional standard of judicial review, the Commission's actions in this case were neither arbitrary nor irrational. The lower court, conceding the Commission's broad authority to construe "the grand and open-ended statutory requirements" (A. 455), justified its intervention on constitutional grounds and "in light of First Amendment interests" (*id.*). The First Amendment, however, does not justify a result which disserves rather than advances the public's right to know. See pp. 29-33, *supra*. The improvidence of the lower court's decision becomes even more plain when it is viewed in the context of agency responsibility.

To impose its access regime, the lower court went well beyond the traditional role of upholding or setting aside agency action. It was obliged to direct the agency to undertake an investigation and promulgate guidelines to solve the ramifying problems presented by the court's own decision. Clearly the court has extended itself into the agency's province to make and direct policy when it commits the agency to a compulsory access regime. The difficulties involved in such a regime are virtually a dismal swamp.[42] Yet the lower court's decision would force the

[42] There are innumerable problems that would have to be resolved, usually on a continuing basis, in instituting and administering a compulsory access regime: when could a commercial editorial be excluded because of its content (*e.g.*, defamatory, actionable, false or misleading, or frivolous spots); would the fairness doctrine apply to editorial commercials and if so how (*e.g.*, can spots be balanced by program time; what is the minimum ratio of reply spots); may free time to answer such commercials be required under *Cullman;* may quotas on such spots be imposed and what kind; what limits if any could be used to prevent domination by one viewpoint, repetition, or triviality; what contractual provisions (*e.g.*, indemnification; prior submission) could be imposed; what priorities among advertisers should be employed (*e.g.*, first come, first served; broadcaster discretion; urgency); how may spots be placed (*e.g.*, in or near newscasts, outside prime time); must the station explain a refusal

Commission to devote a substantial portion of its time during the years ahead to instituting a project potentially far more complex and time-consuming than the fairness doctrine itself.

If the court's opinion stands, the problems will not stop with paid editorial advertising. BEM has already announced to the Commission that compulsory access must also be provided to program time. Joint Comments of BEM, *et al.* in Docket 19260, March 21, 1972, pp. 27-29. It also now asserts that broadcasters are obliged to make free time available both for editorial advertisements and for programs "for those elements of society–local, regional and national–which lack the resources to purchase access time . . . ." *Id.* at 30-31. Plainly the next chapter will find BEM in court urging that the Constitution compels the Commission to pursue these new adventures.

It is the agency, not the lower court, which is qualified by technical competence and experience to decide whether and when major new departures in broadcasting regulation should be undertaken. It, too, can appreciate, what impact one measure may have on another in the fine-geared process of agency regulation.[43] Finally, it is

of a particular editorial commercial and how quickly must it decide; what Commission review procedures would operate and what standards would govern (*e.g.*, station good faith judgment; reasonableness). Many more problems could easily be listed, few would be easily solved, and each would invite further judicial review.

[43] For example, one serious problem of compulsory access is the financial burden thrown on stations because of their potential obligation to provide free reply time to access spots under the *Cullman* doctrine (see A. 264-65, 486). Yet the Commission has recently instituted another measure–its prime time rules (p. 41, n. 41, *supra*)–which is likely to impair the revenues of smaller

the agency that can weigh alternative means to the same end and chose the one most feasible in light of conflicting interests and its own responsibilities.

The lower court's action is especially jarring because it occurred shortly after the Commission embarked on a far-reaching inquiry designed to appraise the fairness doctrine and consider a variety of possible changes including the feasibility and design of some new variety of access. *Study of Fairness Doctrine*, 30 F.C.C.2d 26, 27 (1971). This investigation is currently under way subject, of course, to whatever disposition this Court may make of the present case. See *Order and Further Notice of Inquiry*, 33 F.C.C.2d 798 (1972).

This FCC investigation now in progress has not prejudged the question whether compulsory access is warranted. The comments being submitted both by broadcasters and access proponents may persuade the Commission this step would not be in the public interest; or conceivably the Commission could decide upon an access regime but of a very different kind from that mandated by the lower court. Whatever the agency might decide, its own regulatory position—unlike the rigid constitutional judgment of the lower court—could readily be altered in the light of future experience.[44]

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stations. Expanding CATV operations also will adversely affect stations. The Commission alone can judge how many such changes can be absorbed in any period before the cumulative result impairs the broadcaster's ability to program in the public interest.

[44] As Professor Jaffe observed of the lower court's decision, if there is to be an access regime "the regulatory scheme will have to be flexible, and flexibility is more difficult to achieve under the mighty connotations of the first amendment." Jaffe, "The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access," 85 *Harv. L. Rev.* 768, 784 (1972).

III. WTOP'S POLICY REGARDING EDITORIAL ADVERTISEMENTS IS BASED ON A REASONABLE JOURNALISTIC JUDGMENT INVOLVING NO INVIDIOUS DISCRIMINATION.

Although the lower court's decision purports to rest on First Amendment grounds, its opinion is laden with the rhetoric of equal protection (A. 474-80). WTOP's policy toward editorial commercials, however, involves no invidious discrimination, assuming *arguendo* that the policy is properly regarded as state action directly subject to equal protection principles. See pp. 52-62, *infra*. Judged by the pertinent facts and decisions of this Court, the station's approach represents a reasonable exercise of journalistic judgment.

WTOP's broadcasting policies favor the presentation not of product commercials but of public issues. Public issues are presented through a range of programming from news reports and news interviews through panel and interview programs to commentaries and editorials, while commercials are relegated to spots of 60 seconds or less. Broadcast stations devote special effort and expense to public issue programming which, in the case of WTOP, occupies most of its broadcasting day.[45] Commercials are produced and paid for by the advertisers involved. Under the fairness doctrine and related requirements, a broadcaster must make affirmative efforts to canvas the community, provide adequate coverage of public issues,

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[45] WTOP maintains a large staff of reporters and news analysts for this journalistic function and has individual reporters assigned to provide in-depth coverage on a regular basis of a variety of national and local matters including, as examples, the ghetto, Capitol Hill, and consumer matters. See Brief for BEM in the Court of Appeals, Nov. 23, 1970, App. B, pp. 5-6.

and offer a full range of viewpoints to the public. No such obligation attaches to the broadcast of product commercials, and no advertiser has a "right" to have his advertisements aired, let alone to have his products promoted as news items.

In presenting individual subjects or viewpoints on public issues, a station may not under the fairness doctrine make choices on the basis of personal preference for specific views or causes but is compelled to exercise a good faith independent judgment. See p. 22, *supra.* Certainly in the present case substantial time was devoted to the Vietnam war and the public was exposed to the full spectrum of opinions including those of BEM. WTOP has not confined "partisan voices" to commercials; the station has presented advocates who have aired strong opinions about the war and has made every effort to offer informed speakers on all sides of the issue. See pp. 9-10, *supra.*

Thus, WTOP does not prefer commercial messages to public issues nor select invidiously among viewpoints or advocates. Brought into focus, the "discrimination" attributed to WTOP by the lower court resolves itself to this: WTOP has sought to cover public issues in the context of regular programming, where the station strives for fair and effective coverage, and not in short, sponsored spots used to advertise commercial products and services. Of course, there is a "difference" in approach to the two categories because product commercials and public issue coverage present very different problems. The equal protection requirement is not violated, however, by treating "different classes" in "different ways." *Reed v. Reed*, 404 U.S. 71, 75-76 (1972).

Under the decisions of this Court, a difference in treatment is lawful under equal protection standards when it is "reasonable, not arbitrary" (*id.* at 76) and bears a rational relationship to the achievement of legitimate ends.[46] WTOP believes that its policy is the best means for assuring fair and effective presentation of conflicting views on controversial issues with a minimum of government involvement in the process of radio journalism. There is certainly a rational basis for the station's judgment that its policy will serve that end, and there are not one but several grounds which support it.

Short spots of 60 seconds or less, however useful for the sale of tooth paste, are a highly questionable medium for informing the public about controversial issues or advocating ideas. In fact, the 60-second editorial commercials proposed by BEM do not contain more than 20 or 35 seconds of substance, once identifications, introductory statements and concluding sentences have been taken into account (A. 317). "These lengths," as one advertising specialist noted, "defy discussion of issues" and encourage the "shallowest" imagery and "shoddiest" logic.[47] It is not an invidious discrimination against "ideas" for a station to present them instead in formats less susceptible to the abuses of propaganda.

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[46] *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Railway Express Agency* v. *New York*, 366 U.S. 106 (1949); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1949); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911).

[47] Statement of John O'Toole, president of Foote, Cone & Belding, reprinted in 118 *Cong. Rec.* S 985-86 (daily ed. 1972). John Gardner, chairman of Common Cause, recently urged broadcasters not to air even the traditional election campaign spots but to require a minimum length of five minutes for such announcements. A spot announcement of 60 seconds or less, he said, "is too brief for discussion of any significant issue. It is in fact

There are also sound reasons for believing that the use of such editorial advertisements would jeopardize the fair presentation of controversial issues as contemplated by the fairness doctrine and the *Red Lion* decision. See pp. 29-31, *supra*. If the fairness doctrine were applied to editorial commercials then the station would be forced to divert program time from other issues and those with the thickest wallet would determine where emphasis is to be placed in selecting the issues for public discussion. If the fairness doctrine were not applied, the alternative could well be a "onesided flood" of partisan argument on the airwaves (A. 485).

Finally, the widespread use of editorial commercials must inevitably lead to greater government involvement in the process of broadcast journalism. Administration of a private constitutional right to require carriage of editorial commercials would entail repeated court and agency decisions on numerous questions concerning the number, content, balance, placement, and propriety of editorial advertisements. See pp. 31-33, *supra*. The guidelines contemplated by the lower court are precisely the kind of government superintendence long deemed antithetical to free speech.

These considerations cannot be dismissed as slight or fanciful. The policy followed by WTOP has long been followed by other major broadcasters. P. 8, *supra*. The same concern about presenting complex topics in 60-second spots is shared by commentators outside the

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a studied means of *not* informing the voter in any significant way." Speech of John Gardner, Feb. 23, 1972, pp. 7-8. See also Wall St. J., March 9, 1972, p. 12, and New York Times, Dec. 6, 1970, p. 25, criticizing use of spots for these purposes. WTOP's broadcasting of election spots is explained by the special statutory and administrative treatment of that subject (p. 7, n. 10, *supra*), but the station encourages the use of more thorough presentations by affording election candidates free program time.

industry. See p. 47, *supra*.[48] The Commission has confirmed that compulsory access would adversely affect the fairness doctrine; and this Court's own opinions recognize the threat to free speech from undue government regulation. See pp. 32, 40, *supra*. Since a sound basis exists for WTOP's judgment, that judgment is not rendered unconstitutional because others may take a different view of its wisdom. For, in the words of this Court, "conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure . . . ." *Dandridge* v. *Williams*, 397 U.S. 471, 487 (1970).

Several passages in the opinion below suggest that a merely "reasonable" distinction between the treatment of public issues and of commercial advertising cannot be justified when First Amendment interests are at stake and that some "very substantial harm" must be demonstrated to sustain WTOP's policy (A. 481). There are decisions that require a "compelling state interest" where a classification operates to foreclose a protected interest, although the case law is far from uniform.[49] Assuming the standard to be sound in the abstract, however, it does not effect the outcome of this case for two reasons.

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[48] There has also been direct criticism of political spot advertising in Congress. See Statement of Senator Stevenson (D. Ill.), 118 *Cong. Rec.* S 985 (daily ed. 1972). A recent bill introduced by Congressman Anderson (R. Ill.) required that stations furnish certain federal candidates free broadcast time but required minimum blocks of 15 minutes each and "formats intended to promote rational political discussion." H.R. 19904, 91st Cong., 2d Sess. (1970).

[49] *Compare, e.g., Harper* v. *Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (voting), *with McGowan* v. *Maryland*, 366 U.S. 420 (1961) (religion). See generally *Weber* v. *Aetna Cas. & Ins. Co.*, 40 U.S. L. Wk. 4460 (U.S. April 24, 1972); "Developments in the Law—Equal Protection," 82 *Harv. L. Rev.* 1065, 1127-31 (1969).

First, this is not an instance in which First Amendment rights are being undermined or constrained by challenged classification. If anything is clear from *Red Lion*, it is that BEM has no private First Amendment right to insist on the use of a broadcast station. The dominating concern is the public's right to know. See pp. 25-26, *supra*. WTOP's programming extensively presents conflicting views on controversial subjects, including the Vietnam war and the BEM's own viewpoint on it, and there is no showing that its means of doing so impairs the public's right to be amply and fairly informed. Cf. *Schilb* v. *Kuebel*, 404 U.S. 357, 365 (1971).

Second, WTOP's policy is fully justified by a "compelling" interest sanctioned by *Red Lion* itself. For, as previously shown, the station's approach enhances its ability to furnish the public with a thorough and balanced exposure to conflicting viewpoints. It is the lower court's regime of compulsory access that threatens that ability by giving undue weight to the affluent and assuring pervasive government influence in broadcasting. See pp. 29-33, *supra*. In short, First Amendment interests weigh heavily in *favor* of the station's policy and, between the right of the public as defined in the *Red Lion* decision, and any private claim of BEM, certainly the former must prevail.[50]

The lower court's reliance on equal protection formulae is more ritual than substance. Its own opinion discloses that the court is seeking to secure for BEM not equal treatment with commercial advertisers but marked

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[50] See *Red Lion*, 395 U.S. at 390-91; *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945); *Lafayette Radio Electronics Corp.* v. *United States*, 345 F.2d 278 (2d Cir. 1965).

preference. Neither the lower court nor BEM would for a moment be satisfied with the stringent plenary control WTOP exercises over commercial advertising spots, their content, placement and number.[51] Indeed, the lower court went out of its way to assert that under its new access regime "the licensee should not begin to exercise the same 'authoritative selection' in editorial advertising which he exercises in normal programming" (A. 485).

In the last analysis parity of treatment between controversial questions and run-of-the-mill product commercials has little to do with the central issue. Whether or not the lower court's "general regime" of compelled access (A. 485) supplants WTOP's existing practice, the different nature of the two categories dictates differences in treatment.[52] The gist of the matter is not equality but how important issues should be presented to the public, what format should be used, and who should choose the speakers.

Under the statutory plan, Congress confided to each station the responsibility that the lower court seeks to invest in partisans like BEM, struggling to shape public

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[51] The broadcaster is, in fact, enjoined by the Commission to ascertain that no material including advertising copy is broadcast "which will deceive or mislead the public." *Report on Programming Policy*, 20 P&F R.R. 1901, 1904 (1960); *Licensee Responsibility for Advertising*, FCC 61-1316, November 1, 1961.

[52] For example, the lower court itself proposed that the Commission institute "reasonable regulations" for editorial advertisements "to prevent domination by a few groups or a few viewpoints" (A. 485). Yet when it suggested that there could be some outside limits on the amount of advertising time sold to "one group or to representatives of one particular narrow viewpoint" (*id.*), it was untroubled that no equivalent limitations would be imposed on commercial advertisements.

opinion to their own ends, and ultimately in the Commission and the courts. The journalistic judgment made by WTOP in this instance was exactly the kind of resolution the Commission has repeatedly called on broadcasters to make in the exercise of their own independent judgment. While BEM and the lower court readily characterize WTOP as a "fiduciary" or "proxy" required to act in the public interest (*e.g.*, A. 461), both would ultimately withhold from the station the very essence of trusteeship: the authority to make reasonable decisions about what course will best serve the interests confided to the station.

IV. WTOP IS NOT AN INSTRUMENTALITY OF THE STATE AND THE EXTENSION OF THE STATE ACTION CONCEPT TO BROADCASTING STATIONS IS NOT APPROPRIATE.

A. WTOP's Broadcasting Policy Toward Editorial Advertisements Was Adopted Independently of the Commission and Does Not Represent State Action.

It is well settled that the First Amendment and equal protection requirements of the Constitution extend only to state action and do not control or limit "private conduct."[53] WTOP's policy of not broadcasting editorial advertisements and its decision not to accept BEM's messages were those of the station, and neither one was instigated or compelled by the Commission. In fact, the Commission in its *BEM* and *DNC* opinions emphasized the broadcaster's discretion to make its own judgments

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[53] *United States* v. *Guest*, 383 U.S. 745, 755 (1966); *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451, 461 (1952); *Civil Rights Cases*, 109 U.S. 3 (1883).

(A. 264), and it took pains to note "that there is of course no Commission policy thwarting sale of time to comment on public issues" and "licensees are free to do so" (A. 265).

It follows that, apart from any other defects in its decision, the lower court's judgment must be reversed unless it was justified in classifying WTOP's decisions as state action for constitutional purposes. The court recognized that a finding of state action was necessary to its result and devoted almost ten pages of its opinion to arguments that broadcaster decisions are equivalent to state action.[54] Yet the lower court's discussion is a melange of remote analogies and quotations which serve only to emphasize that this Court has never applied the state action concept to private broadcasting.

Whether the relationship between a private entity and the government is of a kind that subjects the former's decisions to direct constitutional restraints is ultimately a question for the courts. Yet in broadcasting it is Congress that has designed and structured that relationship, so the statutory plan must be the starting point of any inquiry. Demonstrably, Congress did not intend to make the broadcaster an arm of the Federal Government but sought instead to maintain a benign separation between the two.

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[54] The state action determination permitted the court to invoke the familiar line of "access" cases which involved such public instrumentalities as subways and public schools. While those cases are distinguishable even if broadcasters be regarded as state instrumentalities (see p. 27, *supra*), they can have no bearing whatever if the lower court's state action determination is erroneous.

Congress, far from entrusting the function of broadcasting to the government, provided for licensing of numerous stations operating in free competition with one another, and forbad censorship by the Commission. Section 326, 47 U.S.C. §326.[55] Congress did not even impose the plenary regulation utilized for common carriers and public utilities. The Act did not confer on broadcasters the traditional protections and privileges of local monopoly; on the other hand, the Act excluded any common carrier obligation for broadcasters (Section 3(h), 47 U.S.C. §153(h)) and avoided the detailed regulation of rates, revenues and practices customary for a regulated industry. Compare Sections 201-23 of the Act, 47 U.S.C. §§ 201-23 (Title II).

As the thousands of independent stations have developed in this country, their operations resemble such traditionally private enterprises as newspapers more closely than any other analogy. In many communities, in fact, broadcasting stations are more numerous than daily newspapers and are subject to greater competition among themselves.[56] The broadcasters' independent appraisal

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[55] This Court summarized the matter in *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474-75 (1940): "[T]he Act recognizes that broadcasters are not common carriers and are not to be dealt with as such"; "it recognizes the field of broadcasting is one of free competition"; "the Act does not essay to regulate the business of the licensee"; and "the Commission is given no supervisory control of the programs, of business management or of policy." See also *Pulitzer Pub. Co.* v. *FCC*, 94 F.2d 249, 251 (D.C. Cir. 1937).

[56] For example, in 1971 there were 7,358 commercial radio and television stations in operation compared with only 1,818 daily newspapers in the United States. FCC, *Broadcast Station Totals* for December 1971, Jan. 11, 1972; U.S. Census Bureau, *Statistical*

and frequent criticism of the actions of the government and its officials have been among the most salient characteristics of broadcasting in this country.

Under these circumstances, it is hardly surprising that until the lower court's opinion, the courts were unanimous in declining to treat broadcasters as instrumentalities of the government for state action purposes. The First Circuit squarely so held in *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F.2d 597, 601 (1945), *cert. denied*, 327 U.S. 779 (1946), saying:

> "[T]he First Amendment was intended to operate as a limitation to the actions of Congress and of the federal government. The defendant [radio station WPEN] is not an instrumentality of the federal government but a privately owned corporation. . . . Congress has not made WPEN an agency of government. For this court to adopt the view that it has such a status would be judicial legislation of the most obvious kind."

The same conclusion was reached by the First Circuit in *Massachusetts Universalist Convention* v. *Hildreth & Rogers*, 183 F.2d 497 (1950), and by the District Court in *Post* v. *Payton*, 323 F. Supp. 799 (E.D. N.Y. 1971).

These authorities are reinforced by more recent decisions in three other federal courts holding that newspapers were not engaged in state action when they

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Abstract of the United States 491 (1971). Washington, D.C., receives several dozen stations and channels (see, *e.g.*, A. 329) and has only a few newspapers. The Commission's own anti-concentration rules (*e.g.*, 47 C.F.R. §73.240) are in many respects more rigorous than the antitrust laws.

refused to accept advertisements.[57] The complainants in those cases had no difficulty showing that newspapers are subject to numerous advantages and obligations under federal, state, and municipal law,[58] and they invoked the same line of arguments relied on by the opinion below in this case. Yet, each of the courts unanimously rejected these arguments. In the words of the *Love* decision, the concept of state action is "singularly inappropriate" to describe the relationship of the press and the government. 322 F. Supp. at 1105.

In sum, the statutory plan for broadcasting is designed to maintain, rather than elide, broadcaster independence from the government. Stations in their coverage of public issues perform the same journalistic role as newspapers,

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[57] *Chicago Joint Board* v. *Chicago Tribune*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); *Associates & Aldrich Co.* v. *Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971); *Resident Participation of Denver, Inc.* v. *Love*, 322 F. Supp. 1100 (D. Colo. 1971) (three-judge district court).

[58] Examples under federal law include reduced postal rates (39 U.S.C. §3626); exemption from telephone and telegraph excise tax (26 U.S.C. § 4253(b)); exemption from custom duties (19 U.S.C. §1202, para. 270.55); and special tax treatment respecting circulation expenses (26 U.S.C. §173). See generally *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146 (1946); *Lewis Pub. Co.* v. *Morgan*, 229 U.S. 288 (1913). States and municipalities vary, of course, but in the case of the Chicago papers involved in the *Chicago Tribune* case its employees were exempt from jury service; specified legal notices and local ordinances were required to be published in them; a spate of tax exemptions applied; a local ordinance provided special advantages for street sales; and as a matter of practice newsmen were furnished special space in buildings. 435 F.2d at 473. See also *Resident Participation of Denver, Inc.* v. *Love*, 322 F. Supp. 1100, 1102 (D. Colo. 1971).

whose "historic function . . . has been to oppose government, to be its critic, not its accomplice." *Resident Participation of Denver, Inc.* v. *Love*, 322 F. Supp. 1100, 1105 (D. Colo. 1971). Prior judicial decisions have uniformly rejected the state action label for broadcasters and newspapers alike. Thus, whether one looks to design, function, or precedent, the lower court's equation of WTOP's policy decisions with state action is in error.

B. The State Action Concept Should Not Be Expanded To Embrace Independent Journalistic Decisions by Broadcast Stations.

Nothing in the decisions of this Court ordains that the journalistic judgment of an individual broadcaster, which is neither instigated nor compelled by the Commission, constitutes state action for constitutional purposes. Even brief analysis of the principal citations and generalities proferred by the lower court shows that none is controlling. While *Red Lion* is invoked by the lower court as "the most important recent development" since *McIntire* and *Hildreth* (A. 456-57), no state action issue of any kind was involved in *Red Lion* since that case concerned the lawfulness of affirmative agency action. None of the other decisions of this Court discussed below involved broadcasting, and the principles the lower court appears to derive from those decisions would essentially destroy any distinction between state and private action.

The lower court relied importantly upon cases finding state action where nominally private entities engaged in what the Court regarded as "public functions"—such as operating towns, parks or thoroughfares.[59] In this

[59] *Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Evans* v. *Newton*, 382 U.S. 296 (1966); *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

country, however, broadcasting has been a private rather than a public function virtually from the outset. If a privately operated school is not *per se* engaged in a state action in a land where public schools abound, then surely a broadcast station does not meet the "public function" test. Compare *Pennsylvania* v. *Board of Trusts*, 353 U.S. 230 (1957).

It is equally unpersuasive to suggest that broadcasters are engaged in state action because stations are licensed and regulated (A. 460-61). A vast number of private occupations from medicine to architecture are licensed and regulated, and the regime imposed on broadcasting is designed as much to maintain a separation between the government and stations as it is to impose limitations.[60] Even in the sphere of common carriers and public utilities, where government regulation is pervasive, the authority for regarding them as engaged in state action is paper thin;[61] broadcasting stations are, in any event, not common carriers nor subject to the same pervasive regulation.

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[60] "To treat this limited and necessary involvement as a predicate for a far broader, constitutionally imposed scheme of limitations on First Amendment rights would be bootstrapping at its worst." Note, "Free Speech and the Mass Media," 57 *Va. L. Rev.* 636, 643 (1971) (footnote omitted).

[61] The only relevant discussion of this Court is a dictum in *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451, 462 (1952). There, the Court reviewed, in light of constitutional objections, the decision of the regulatory agency that the local bus company could install radio receivers in its vehicles consistent with the public safety, convenience and necessity. Unlike WTOP, the bus system was a regulated common carrier enjoying "a substantial monopoly of street, railway and bus transportation" in the community (343 U.S. at 462); and, in contrast to the present case, the agency had made a determination that the installation of radio equipment was affirmatively desirable. *Id.* at 459, 462.

The lower court's opinion asserts that broadcasters use the airways which are part of the "public domain" (A. 460). Yet "in one way or another we all use air and space,"[62] and no one would suggest that a demonstrator, who makes equal use of the "public streets," is engaged in state action and obliged to provide BEM "access" on his placard. The lower court's concluding argument that broadcasting is state action because it involves an important communications medium needs little comment; books, newspapers, and magazines are hardly less important and the very importance of broadcasting argues against, not for, new government restraints upon it.

The court below not only ignored the legislative plan for broadcasting stations and the journalistic function they perform, but stretched the concept of state action far beyond the point marked out by this Court's precedents. The issue can, in any event, hardly be decided by mechanical extrapolation from out-of-context quotations from prior decisions.[63] What should be decisive

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[62] Jaffe, "The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access," 85 *Harv. L. Rev.* 768, 783 (1972). The reference to the "public domain" was drawn from *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966), which did not involve any question of state action. The phrase was there used in explaining why broadcasters were subject to public obligations and the case does not even suggest that broadcaster action amounts to state action.

[63] This Court has warned against just such an approach to state action problems, saying that state action "can be determined only in the framework of particular facts or circumstances present." See *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 726 (1961). This warning is ignored by the lower court's opinion

here is that such an expansion of the state action concept to broadcasting is not necessary to any sound purpose and its consequences would be adverse in almost every important respect.

Broadcasters in this country are presently subject to numerous requirements, both under federal legislation and administrative regulations, designed to serve the interests embodied in the First Amendment. Examples range from the equal time and fairness doctrine provisions of Section 315(a), 47 U.S.C. § 315(a), to the Commission's *Cullman* doctrine and multiple ownership rules. In this respect, the position of the broadcasters is markedly different from entities like the company town in *Marsh* v. *Alabama* and the supermarket complex in the *Logan* case (see p. 57, *supra*) where in the absence of constitutional restraints, free speech would go without protection. The immediate dangers in broadcasting rather stem from the inhibiting consequences of too much supervision and control rather than too little.[64]

The result of the lower court's action is thus not to impose regulation on broadcasting, since that already exists, but to impose new burdens and to promote a shift in responsibility for regulation to the federal courts.

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which, to borrow the words of another distinguished judge, represents "the domino method of Constitutional adjudication . . . wherein every explanatory statement in a previous opinion is made the basis of extension to a wholly different situation." Friendly, "The Bill of Rights As a Code of Criminal Procedure," 53 *Calif. L. Rev.* 929, 950 (1965).

[64] See Alfred I. duPont-Columbia University, *Survey of Broadcast Journalism* 1969-1970, at 41-45, 79-80 (1970); Statement of William Monroe, 118 *Cong. Rec.* S 3002 (daily ed. 1972); Kalven, "Broadcasting, Public Policy and the First Amendment," 10 *J. of Law & Econ.* 15, 21-23 (1967).

Issues now resolved pursuant to statutory direction or by agency action under the public interest standard of the Act would be transmuted into questions of constitutional magnitude. If the private right of access sought by BEM is constitutionally required, the courts could hardly avoid review of each subsequent Commission guideline and each application of the guidelines to particular facts.[65]

It is hard to conceive of a stopping point once broadcaster policy decisions are classified as state action. Virtually every journalistic decision of a station—from the hiring of one newsman rather than another to the choice of a documentary stressing pollution rather than the energy crisis—would provide the basis for a First Amendment claim to the Commission followed by plenary review in the federal courts. Today several thousand broadcasting stations function in this country to provide channels of information and opinion independent of government. They can hardly remain in this condition if each policy decision becomes the basis for agency review, and uniformity is prescribed by a constitutional formula.

The benefits of this new endeavor to impose a private claim to access upon the broadcasters can at best be described as speculative and uncertain. In this very case,

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[65] While a broadcaster determination with respect to programming may currently raise issues for the Commission under the fairness doctrine, and thus implicate the courts in judicial review, the involvement of the Commission and the courts is far more limited. The Commission restricts its own intervention to cases where the broadcaster fails to make a reasonable, good faith judgment, and the office of the courts is even more limited by familiar canons that confine judicial review to agency action which is itself arbitrary or otherwise egregious. Administrative Procedure Act §10(e), 5 U.S.C. §706.

for example, BEM's views have already been heard over WTOP and its very messages have been broadcast by several stations in the Washington, D.C. area. What is not speculative or uncertain is that the novel compulsory access regime requires new and on-going limitations on broadcasting that will invade station independence and enhance government involvement and control.

There is always a temptation to introduce new constraints upon the media justifying them on the ground that they will promote free speech in one fashion or another. This in essence is BEM's argument for a state action holding that applies additional limitations to broadcasters, just as is the argument of those who call for legislation forcing newspapers to be "fair." Yet as one of the foremost advocates of free speech stated long ago: "Zealous officials will keep thinking up new ways for improving the press according to their own ideals. And there is no bright line between encouragement and repression."[66]

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[66] II Z. Chafee, *Government and Mass Communications* 709-10 (1947). See also T. Emerson, *The System of Free Expression* 670-71 (1970).

CONCLUSION

For the reasons stated the decisions below should be reversed.

Respectfully submitted,

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ADDENDUM

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 3(h) of the Communications Act of 1934, 47 U.S.C. 153(h), provides:

> "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

Section 315(a) of the Communications Act of 1934, 47 U.S.C. 315(a), provides:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any–
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> (1) bona fide newscast,
> (2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-863, 71-864, 71-865, 71-866

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

DEMOCRATIC NATIONAL COMMITTEE

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (App. 446) is reported at 450 F. 2d 642. The opinions of the Federal Communications Commission (App. 247, 357) are reported at 25 F.C.C. 2d 242 and 25 F.C.C. 2d 216.

JURISDICTION

The judgment of the court of appeals (App. 493) was entered on August 3, 1971, and reissued on October 29, 1971 (U.S. Pet. App. 155a–156a). A timely petition for rehearing and suggestion of rehearing *en banc* was denied on October 4, 1971 (App. 494). The petition for a writ of certiorari was filed on January 3, 1972, and was granted on February 28, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the powers granted to it by the Federal Communications Act, and in light of the inherent limitations on the broadcast spectrum, the Federal Communications Commission, which under its "Fairness Doctrine" requires broadcast licensees to present programming involving controversial issues of public importance, must, because of the First Amendment, also require that the licensees sell time to individuals and groups for the advertising of their particular views.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in relevant part:

> The Congress shall make no law * * * abridging the freedom of speech * * *.

Section 3(h) of the Communications Act of 1934, 48 Stat. 1064, *et seq.*, as amended, 47 U.S.C. 153(h), provides:

> "Common carrier" or "carrier" means any person engaged as a common carrier for hire,

in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

Section 315(a) of the Communications Act of 1934, 48 Stat. 1088, as amended, 86 Stat. 717, 47 U.S.C. 315(a), provides:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall

be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

STATEMENT

These cases arose on petitions for review (App. 419, 422) of two orders of the Federal Communications Commission, announced on the same day (App. 247, 357), regarding claims that commercial radio and television broadcasters cannot refuse to sell any broadcast time for editorial advertisements concerning controversial issues of public importance. Both complainants—Business Executives' Move for Vietnam Peace (BEM), a national organization composed of business executives, and the Democratic National Committee (DNC), the governing body of the national Democratic Party between conventions—urged that broadcasters were required to accept editorial advertisements without regard to whether the station licensee had otherwise fulfilled its affirmative and continuing obligation under the Commission's Fairness Doctrine to inform the public on questions of public importance by presenting representative and contrasting views. The court of appeals reversed the Commission's orders denying these claims and remanded the cases for further proceedings, holding that under the First Amendment the Commission cannot permit broadcasters to maintain a flat ban on

public issue advertisements when other commercial messages are accepted, notwithstanding the broadcasters' coverage of public issues under the Fairness Doctrine (App. 446). The court directed the Commission to develop reasonable procedures and regulations for determining which and how many editorial advertisements shall be broadcast.

A. BEM'S REQUEST FOR BROADCAST TIME

1. *The Proceedings Before The Commission.* On January 22, 1970, BEM filed a complaint with the Commission alleging that radio station WTOP, Washington, D.C., had refused to sell it time to broadcast one-minute spot announcements expressing opposition to the Vietnam war.[1] The station had a general policy of refusing to sell spot announcement time to persons or groups desiring to air their views on controversial public issues (App. 292, 316; 450–451 n. 3), and BEM claimed that the station's refusal to sell time on this basis violated the First Amendment and the Fairness Doctrine.[2] BEM stated, without supporting data, that the station had regularly presented pro-Vietnam war views, but had not devoted any significant amount of time to the other side.

WTOP responded that it had covered all viewpoints on the war and that although a complete quantitative evaluation of its coverage of such a long-term issue was not possible, particularly since WTOP is an all-

[1] BEM included sample announcements with its complaint (App. 298–306).

[2] See Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. 315(a).

news station, a spot check of the three months surrounding BEM's request showed that the station's news reports included on numerous occasions the views of a variety of critics of the war, in addition to hard news coverage of the war. Four station commentators had also reflected various viewpoints on the subject (App. 312–319).[3]

On March 31, 1970, the Commission requested WTOP to submit by April 7 a statement on whether it had presented the viewpoints embodied in the complainant's announcements (App. 349). In response, WTOP submitted an affidavit of its Executive Editor stating that each of the viewpoints in the BEM announcements had been expressed a number of times over WTOP (App. 352). BEM commented by saying that the affidavit added nothing new (App. 353).

2. *The Commission's Decision in BEM.* In its decision of August 5, 1970, the Commission viewed BEM's complaint as charging (1) that WTOP had failed to meet its fairness obligation with respect to the Vietnam War; and (2) that the station's refusal to carry BEM's announcements violated the Fairness Doctrine and the First Amendment (App. 357–368). With respect to the fairness aspect of the complaint, the Commission found that BEM had not demonstrated that WTOP had failed to fulfill its respon-

[3] WTOP also referred to its coverage of particular events related to the war, such as Moratorium activities in October and November of 1969; the President's speech on Vietnam on November 3, 1969, in connection with which it had presented critics of the war; and its news interview programs, which had also presented national figures both for and against the war policies. (App. 314–315.)

sibility to afford a reasonable opportunity for the presentation of significant contrasting views in its overall programming; the licensee had specified a number of specific instances in which it had presented anti-Vietnam war views, while the complainant had made no more than a general allegation of a failure to present conflicting views (App. 360–365).[4]

The Commission further held that WTOP's policy of refusing to sell time for spot announcements on controversial issues did not *per se* violate the Fairness Doctrine or any Commission policy. The Commission noted that a broadcast licensee is not a common carrier under the Act and therefore is not required to open its doors to all persons seeking to use its facilities. Since the licensee had presented contrasting views on the Vietnam war, including the viewpoints embodied in BEM's announcements, the Commission found no reason to require the station to present the views of any particular group in any particular format. It also relied upon the more extensive analyses set forth in its *DNC* decision issued the same day.

As to BEM's contention under the First Amendment, the Commission ruled that *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, did not support BEM's constitutional

[4] The Commission adhered to its established policy that in the absence of specific evidence of a failure to comply with fairness requirements, it would not be reasonable to require a licensee to prove the contrary by producing transcripts or recordings of all of its programs touching on an issue. Here, BEM had not afforded any basis for its complaint on fairness (App. 364).

claims and, relying on its decision in the *DNC* case, *infra,* concluded that BEM's position that WTOP must sell it time is inconsistent with the system of broadcasting created by Congress (App. 368):

> * * * the Communications Act specifically provides that a broadcaster shall not be deemed a common carrier, and thus he may exercise his judgment as to the particular program matter he will present. The licensee is thus constantly called upon to make choices between types and formats of programming and the persons to participate therein. If the licensee were required to present any matter brought to him which was not obscene, etc., the result would be not only chaotic but a wholly different broadcasting system which Congress has not chosen to adopt. [Citation omitted.]

Four Commissioners joined in the opinion, two concurred in the result, and Commissioner Johnson dissented.

B. DNC'S REQUEST FOR A DECLARATORY RULING

1. *The Proceedings Before the Commission.* On May 19, 1970, while the BEM complaint was under consideration, DNC requested the Commission to issue a declaratory ruling that (App. 33–34):

> a. A broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as the DNC, for the solicitation of funds and for comment on public issues; or, alternatively,
>
> b. Any such "general policy" will be taken into consideration—in a manner adverse to the broadcaster—by the Commission in evaluating

whether the grant of a broadcaster's renewal application accords with the public interest.

DNC alleged that televised requests for funds were essential to the integrity of the nation's political processes, as well as to relieve its own precarious financial situation, and that it must promptly launch a national radio and television appeal for funds but could not do so unless "it can be certain that it will be able to obtain the access to the broadcast media which implementation of the plan demands" (App. 16–22). DNC contended that a broadcaster's refusal to grant access to its facilities by responsible groups violates the First Amendment as construed by this Court in the *Red Lion* case, and also contravenes the public interest standards of the Communications Act (App. 25–33).[5]

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[5] The three major networks, American Broadcasting Co. (ABC), National Broadcasting Co. (NBC), and the Columbia Broadcasting System (CBS), submitted comments in response. NBC advised in a brief letter (App. 47) that it had no policy preventing it from selling program time to major national political parties during non-campaign periods for the purpose of presenting the parties' views on controversial issues of public importance, that it would permit solicitation of funds, and that it had in fact offered to sell prime time to DNC for a program. ABC set forth excerpts from its Standards and Policies indicating that except for religious broadcasts, ABC permitted solicitations of funds only with its specific permission; that it would sell time to candidates, their representatives or political organizations upon the opening of an election campaign as determined on the basis of appropriate election laws, or, in its discretion, prior to the official opening of a campaign where it determined that individuals or organizations had a recognized interest in the forthcoming campaign; and that whenever it permitted its facilities to be used for the presentation of one viewpoint, it would afford opportunity for the presentation of

2. *The Commission's Decision on DNC's Request.* In an opinion rendered on the same day as its decision in ***BEM,*** the Commission upheld DNC's claims regarding solicitation of funds by political parties. The Commission noted that none of the three major television networks now had a policy against selling time to political parties for fund raising during non-campaign periods (App. 269), but that CBS's previous policy "of confining such sales of time to election periods would appear arbitrary, since the need for the widest possible financial support for political parties

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contrasting views and would itself decide what subjects were of such interest or importance as to warrant time for their presentation. In the absence of special public interest considerations, however, ABC would not sell time for comment on controversial public issues or for the solicitation of funds. In view of the importance of maintaining strong and viable major political parties, however, ABC proposed to permit fund solicitation by the parties on a reasonable basis. In addition, ABC contended that making time available to any responsible entity that wished to advance its views on controversial issues of public importance or to solicit funds would raise serious problems under the Fairness Doctrine. (App. 42–46.)

CBS submitted a lengthy response, with attachments (App. 48–242). It stated that it would permit the presentation by political parties of a special category of spot announcements for the purpose of fund raising, and that these announcements would not have to be on behalf of candidates or ballot propositions (App. 58). As to a right of general access, however, CBS stated that the public is best served by the presentation of issues and viewpoints within a balanced program schedule, utilizing newsworthiness as the sole criterion; that a regulatory policy imposing common carrier obligations on broadcasters would be contrary to the public interest; that there is no constitutional right to compel broadcast stations to carry programs; and that Congress and the Commission had specifically rejected such a requirement.

is not confined to such periods * * *" (App. 272).

With respect to the question of access, the Commission rejected DNC's contention that individuals or groups have a right to purchase time to comment on public issues—a contention viewed by the Commission as going "to the heart of the system of broadcasting which has developed in this country * * *" (App. 256). The Commission reviewed the licensee's responsibility, as a public trustee, to meet the needs and interests of the public in the various categories of programming, including the special obligation to devote broadcast time to the presentation of news and public affairs, and the discretion necessarily afforded the licensee in discharging his obligations. This discretion, the Commission emphasized, must be exercised in a manner consistent with the public interest (App. 259): "representative community views and voices on controversial issues which are of importance" must be presented and "[a] licensee policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner would run counter to the 'profound national commitment that debate on public issues should be uninhibited, robust, and wide-open.'" As stated in the *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1249 (1949):

> It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

Applying these principles to DNC's request, the Commission could not find that a licensee fulfilling these overriding public interest responsibilities nonetheless operates in a manner inconsistent with the public interest or the First Amendment when it refuses to sell time to individuals or groups wishing to express their particular views. While "there is of course no Commission policy thwarting sale of time to comment on public issues" (App. 265), Congress had specifically refused to impose common carrier responsibilities in the broadcast area (App. 260) and the Court in *Red Lion,* as had the Commission in its *Report on Editorializing,* stressed "the right of the public to be informed—not the right of the broadcaster or any individual or group to speak over broadcast facilities" (App. 263).

Thus, recognition of "a near-absolute right of any person who has the money to buy time * * * would create a common carrier situation which Congress after due deliberation, specifically rejected * * * (App. 267). And, in the Commission's view, it would be contrary to the public interest to transfer responsibility for what should be broadcast from the licensees acting as public trustees to those affluent individuals or groups with the resources to buy air time (App. 263–264). There would be serious practical difficulties in administering such a system, where access would depend on the financial resources of the person seeking to state his opinions on public issues. These problems could not be solved by a "first come, first served platform" (App. 269), which itself would be against the public

interest and would tend to undermine the rationale for the Commission's requirement that broadcasters present contrasting views at the broadcaster's expense if necessary [6] (App. 267–268).

The Commission concluded that neither the Act nor the First Amendment compels such a result. It pointed out that broadcasting is not analogous to other government regulated forums such as public parks or transit systems since in those areas, unlike broadcasting, there is no independent obligation of a licensee to present representative views reflecting opposing viewpoints on public issues.

Five Commissioners joined the opinion; one concurred (App. 273) and Commissioner Johnson dissented (App. 274–287).

C. THE COMMISSION'S INQUIRY INTO ACCESS TO THE BROADCAST MEDIA BY INDIVIDUALS AND GROUPS

On June 19, 1971, after the argument in the court of appeals in these cases, but before the court's decision, the Commission issued a *Notice of Inquiry in Docket 19260,* 30 F.C.C. 2d 26, 36 Fed. Reg. 11825, instituting a broad study into the efficacy of the operation of the fairness doctrine. The Commission specifically undertook the study "in the light of current demands for access to the broadcast media to consider issues of public concern." However, the Commission cautioned that it could not

> abandon the fairness doctrine or treat broadcasters as common carriers who must accept all material offered by any and all comers. The

[6] *Cullman Broadcasting Co.*, 40 F.C.C. 576.

> Communications Act is explicit in these respects (see Section 315(a) and Section 3(h)) and we take the Act as a "given" from which this inquiry necessarily proceeds. * * * [30 F.C.C. 2d at 26–27.]

Rather, the Commission sought comments on whether the policies it has developed under the Act are the most effective means of fostering " 'uninhibited, robust, wide-open' debate on public issues (*New York Times* v. *Sullivan,* 376 U.S. 254, 270)":

> The basic issue we pose here is whether Commission-made policies indeed promote that goal to the maximum extent. Or, are there revisions or even entirely new policies that would serve it more effectively?
>
> * * * It is most important to note in this connection that, to a major extent, ours is a commercially based broadcast system and that this system renders a vital service to the Nation. Any policies adopted by this Commission in the areas covered in the present inquiry should be consistent with the maintenance and growth of that system and should, among other appropriate standards, be so measured. * * * Proposals that in the short run might afford great insight into public issues, but in the long run might tend to undermine the existing broadcast system—e.g., nothing but informational programming in a debate format—would not, in this view, serve the public interest. [30 F.C.C. 2d at 27.]

Noting that it had been 22 years since the Commission's 1949 *Report on Editorializing, supra,* the Commission observed that it was time for another

overview: "If our policies are sound, they should have stood the test of time and application. If they unreasonably restrict the journalistic functions of broadcasters or permit broadcasters unreasonably to restrict access—then corrective action is called for."

Specifically recognizing that the respondents in these cases had claimed that the present system of access under fairness is inadequate, the Commission devoted Part IV of the study to the question whether "there is any feasible method of providing access for discussion of public issues outside the requirements of the fairness doctrine." 30 F.C.C. 2d at 33. It called for comment on the problems raised by paid and free time, the specific standards for determining how access time should be allocated, and the effect of access by others on the licensees' general responsibility to the public and on the licensees' duties under the fairness doctrine. In sum the Commission addressed its inquiry to whether criteria or guidelines for public access can and should be prescribed, or whether the complex problems in doing so require that decisions on access be left to the responsible discretion of the broadcast licensees, subject to correction of abuses on complaint to the Commission (36 Fed. Reg. 11827).

D. THE DECISION OF THE COURT OF APPEALS

Upon petitions for review filed by BEM and DNC pursuant to Section 402(a) of the Communications Act, 47 U.S.C. 402(a), the court of appeals, with Judge McGowan dissenting, reversed. The court summarized its holding as follows (App. 449):

> We hold specifically that a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted. We do not hold, however, that the planned announcements of the petitioners—or, for that matter, of any other particular applicant for air time—must necessarily be accepted by broadcast licensees. Rather, we confine ourselves to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many "editorial advertisements" will be put on the air.

In reaching this result, the court first found "state action" because of the extent of governmental regulation of broadcasting; the importance of the use of the licensed broadcasting media for the communication of ideas; and the Commission's refusal to disapprove the policy of some licensees not to accept editorial advertising (App. 458–464).

The court then discussed the question of access. Although recognizing that the physical limitations of broadcast time necessarily restrict access to the airwaves, the court concluded that within these limitations there is nevertheless under the First Amendment "a reasonably regulated, 'abridgeable' right to speak" held collectively by the general public (App. 467). This abridgeable interest, in the court's view, is derived from the following: the public's right to receive ideas and information (App. 466); the public's "First Amendment interest in the mode or manner—as well as the content—of public debate aired on the

broadcast media" (App. 466–467); and "the interest of individuals and groups in effective self-expression" (App. 467). Moreover, the court held that if commercial advertising is sold at all, a total ban against editorial advertising by broadcasters violates the First Amendment because such a ban discriminates against controversial speech in favor of commercial speech (App. 474–480).

The court ordered the Commission to develop reasonable guidelines governing acceptance of editorial advertisements by broadcasters and remanded the cases to the Commission for this purpose (App. 480–489).

Judge McGowan, dissenting, stated that the responsibilities of broadcast licensees to present controversial views on issues of public importance, subject to the fairness doctrine, satisfied the requirements of the First Amendment. He noted that "This is the system which Congress has, wisely or not, provided as the alternative to public ownership and operation of radio and television communications facilities. * * * It is hardly the path of wisdom to scrap it for a system in which money alone determines what issues are to be aired * * *" (App. 490). He concluded that "within the context of a regulatory scheme which has made provision for the airing of controversial issues of public importance," the First Amendment permits, but does not require, licensees to accept paid editorial advertising (App. 491). On the other hand, under the majority's decision, "The Commission has, at the least, been set a task of heroic proportions, and one whose

very complexities may undermine the premise upon which it is founded" (App. 490).

E. SUBSEQUENT DEVELOPMENTS IN THE COMMISSION'S INQUIRY INTO FAIRNESS AND ACCESS

After denial by the court of appeals of motions for rehearing (App. 494) and stay of the mandate (App. 496, 498), the government applied to this Court for a stay of the mandate. When this Court initially denied that motion on January 24, 1972, the Commission published a further notice of inquiry soliciting comments on the procedures and guidelines necessary to carry out the mandate of the court of appeals. *Further Notice of Inquiry in Docket 19260,* 33 F.C.C. 2d 554, 37 Fed. Reg. 3383.[7]

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[7] The Commission asked the parties particularly to address the following areas (33 F.C.C. 2d at 555–556):

a. May a licensee limit the time available for editorial advertisements and, if so, on what basis?

b. What regulation may the licensee make as to the placement of editorial advertisements?

c. May a licensee prevent domination by a few groups or a few viewpoints and, if so, by what means?

d. May a licensee reject a proffered advertisement on the ground that the particular viewpoint has been sufficiently expressed, short of finding undue dominance?

e. May a licensee reject a proffered advertisement on standards of taste and suitability for access to the home?

f. May a licensee reject a proffered advertisement on the ground that its subject matter is of little or no significance or interest to the community?

g. Are any restrictions on content permissible short of a finding that the material is outside the protection of the First Amendment?

h. Should the Commission's *Cullman* doctrine be applicable to editorial and controversial issue advertisements

When this Court granted certiorari on February 28, 1972, it also stayed the mandate of the court of appeals. The Commission then withdrew the above notice. However, it continued its overall inquiry into the fairness doctrine. With specific regard to access, the Commission requested comments on:

> What policies, if any, concerning access to the broadcast media might properly and feasibly be evolved under the public interest standard of the Communications Act, and what would be their relationship to, and effect upon, present or proposed fairness doctrine policies. We, thus, do not invite comment on what the First Amendment may or may not *require* in this area, but rather on pertinent public interest considerations, including of course the policy of fostering robust, wide-open debate. [*Order and Further Notice of Inquiry in Docket 19260*, 33 F.C.C. 2d 798, 799, 37 Fed. Reg. 4980.][8]

Written comments have been filed and oral presentations were made during panel discussions and oral

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which the licensee would not have aired in the first place except for the required sale of editorial advertising time?

i. What is the relationship generally of editorial advertising to the licensee's responsibilities under the fairness doctrine to make available a reasonable opportunity for the presentation of conflicting views on controversial issues of public importance? In this connection consideration should be given to the decision of the Supreme Court in *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367 (1969).

[8] The Commission confined its inquiry to the non-constitutional aspects of access because the First Amendment issue had been placed before this Court for determination and certiorari had been granted. It also stated "that final decision * * * may be delayed and made in light of the Supreme Court's action." 37 Fed. Reg. 4980.

argument[9] before the Commission during the week of March 27, 1972.

SUMMARY OF ARGUMENT

A

The Commission's Fairness Doctrine, as developed over many years of broadcast regulation, as approved by Congress and as sustained by this Court in *Red Lion,* requires licensees to operate as public trustees, giving coverage to public issues that is adequate and that fairly reflects opposing views. This must be done at the broadcaster's own expense if necessary. In addition, the broadcaster has an affirmative obligation to discover and fulfill the needs and desires of his particular service area. Failure to comply with these duties can result in loss of the license to broadcast.

Freedom of broadcast journalism is thus subordinated to the public interest in hearing diverse views, although the broadcaster must still exercise discretion in determining how to allocate broadcasting time between the various areas of interest to the public. And, in serving the "paramount" right[10] of the listeners and viewers with respect to issues of public importance, the licensee must use responsible journalistic judgment in choosing the format for the program and the spokesmen to present opinions on the question.

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[9] The scheduling of the panel discussions and oral argument, as well as the agenda, were set forth in an *Order in Docket No 19260*, 33 F.C.C. 2d 800, 37 Fed. Reg. 4578.

[10] *Red Lion*, *supra*, 395 U.S. at 390.

B

In holding that the First Amendment requires broadcasters to sell advertising time to persons wishing to discuss controversial public issues regardless of whether the broadcaster has fulfilled its obligation under the Fairness Doctrine to cover such issues fully and fairly, the court of appeals relied on the public's interest in the content of discussion, in the mode of presentation, and in effective self-expression.

While the Commission obviously shares these concerns since they are the very foundation of the Fairness Doctrine, the court's conclusion—that the Constitution compels the Commission to institute a regulatory scheme forbidding broadcasters from having a policy of not selling time for editorial advertisements—does not follow. When it comes to how the Commission should affirmatively promote the public's First Amendment interest in the communications media, the Constitution permits a range of choices, just as the Constitution allowed Congress a range of choices in deciding what kind of system of broadcast regulation would best serve the public interest, convenience and necessity. Of course, when the Commission does develop a certain regulatory scheme such as the Fairness Doctrine, this must be consistent with the First Amendment; and whether it is depends not only on the objective but also on the means adopted to achieve it.

But if the Commission refrains from adopting a particular affirmative policy, as it did here, its decision should be sustained as within permissible limits of constitutional choice if the Commission has reason-

able grounds, in light of the existing regulatory system, for not adopting it. Otherwise, whatever a court, on the basis of the limited information before it, deems best to encourage freedom of speech on the airwaves will become frozen into the Act. And the Commission and Congress would thereby be ousted of their decision-making roles in the highly complex and important area of commercial broadcasting where the question of what ought to be done is often intertwined with the practical administrative question of what reasonably can be done.

C

1. In refusing to recognize and implement the right of access claimed by respondents, the Commission acted consistently with First Amendment values and in accordance with the regulatory system Congress enacted. Section 3(h) of the Communications Act, 47 U.S.C. 153(h), declares that broadcasters are not common carriers. The legislative history of the Act and its predecessor, the Radio Act of 1927, shows that Congress explicitly rejected a provision that would have required licensees to act as common carriers with respect to questions affecting the public.

The court's decision pushes broadcasting very far in the direction Congress disapproved, yet the system of broadcast regulation Congress legislated has never been thought to be outside the permissible limits of constitutional choice. In light of Section 3(h), the Commission reasonably refused to recognize a right of access as broad as that suggested by the court below and, instead, began a general inquiry to determine

whether there is any feasible method of providing additional public access within the present statutory structure. This is a sound approach to such a complex problem and it is a constitutionally permissible one.

2. The court of appeals held that a broadcaster's refusal to sell time for editorial advertisements discriminates against public issues in favor of commercial advertising. But this question can properly be viewed only in terms of how the broadcaster allocates air time between commercial uses and public issue speech. And since licensees must devote substantial air time to public issues regardless of whether they accept product advertising, there is no discrimination.

Moreover, contrary to the court of appeals' assumption, broadcasters do exercise control over product advertisements; indeed they have an obligation to do so. And the general duties of broadcasters—both commercial and non-commercial—under the Fairness Doctrine extend to every minute of every day the station is on the air. It does not make a constitutional difference that some broadcasters accept commercial advertising; at the least, the Constitution allows the Commission to develop a regulatory system, as it has done, that makes no such distinction.

3. There are, moreover, practical reasons why it was reasonable for the Commission to conclude that it should not recognize and implement the right of access claimed by respondents.

The "right" created by the court below is a right of access only for those persons wealthy enough to purchase air time and could therefore lead to domination

of the discussion of public issues by the rich. Yet this Court in *Red Lion,* 395 U.S. at 392, expressed disapproval of a system in which the "highest bidders" would get the available time. Indeed it has already been suggested that the result reached by the court below on the basis of the First Amendment, if implemented, would itself be unconstitutional because it discriminates against the poor.

Moreover, a first-come, first-served system of apportioning the limited time available could still lead to domination by the rich, who could make continued requests for time. It is no answer to say that the Commission could devise rules for determining whether one person's speech should be broadcast instead of another's. That would interject the Commission, as never before, into day-to-day programming decisions. The Commission reasonably decided not to embark upon such a venture, at least not without further study.

Furthermore, if the Commission's *Cullman* doctrine were applied to editorial advertisements that broadcasters were compelled to accept, the broadcasters would be required to present contrasting views, free-of-charge if necessary. But Commissioner Cox, concurring in *DNC* (App. 369), pointed out that requiring broadcasters to correct imbalances they had not created by allowing free reply time would "unreasonably expose them to erosion of their advertising revenues." While it was suggested below that the solution would be to suspend the Fairness Doctrine in this area, that would hardly result in a better regulatory system than the present one, which requires broad-

casters to give full coverage to public issues and to present contrasting views.

Finally, the court's decision thrusts the Commission into the role of arbiter, with each refusal to sell time giving rise to a potential First Amendment claim. Even if the Commission could find a way of deciding competing claims for the limited time available on a basis that would not prefer one person's speech over another's, the danger that this eventually would occur is real—and it is a danger the Commission has sought to avoid in developing the issue-oriented Fairness Doctrine, which requires licensees to exercise reasonable discretion in determining what spokesman should present the various sides of a public issue and in what format the presentation should be made.

Before the court had rendered its decision here, the Commission had begun a comprehensive inquiry to consider what changes, if any, should be made in the present regulatory system with respect to coverage of controversial public issues. The need for this kind of far-reaching and thorough inquiry, which the Commission has resumed, is one of the reasons why Congress created an administrative agency to deal with such important and complex matters of regulatory policy.

Since the Commission's refusal to implement, at this time, the right of access claimed by respondents was reasonable in light of the foregoing considerations and of the protections afforded by the Fairness Doctrine to the public's First Amendment interest in broadcasting, the court of appeals should have affirmed the Commission's decisions in these cases.

468-033—72——3

ARGUMENT

Because the broadcast spectrum is limited, its use must be regulated to accommodate the interests of all, lest in the "cacaphony of competing voices" none will clearly be heard. *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367, 376. Accordingly, no individual or group has "an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish." *Id.* at 388. "It is the right of the viewers and listeners * * * which is paramount." *Id.* at 390. To implement this right of the listening and viewing public, choices must be made among various means of accommodating the public's interest in maintaining freedom of speech within the inherent physical limitations on access to the airwaves. In the public interest standards of the Communications Act of 1934, and in the 1959 amendment to Section 315 of that Act, Congress charged the Federal Communications Commission with the primary responsibility of making these choices. The decision of the court of appeals in this case substantially encroaches upon that responsibility. In effect it transfers the making of basic policy judgments from the Commission to the courts, and, in so doing, sets a significant new course for broadcasting, a course that in our view is both unwise and unwarranted. This case has great importance because of the immediate consequences of the court's decision for radio and television broadcasting, but it is important too because of what the decision below portends for the future role of the Commission and the courts in the regulatory system Congress has legislated.

IT WAS REASONABLE AND CONSTITUTIONALLY PROPER FOR THE FEDERAL COMMUNICATIONS COMMISSION TO REFRAIN FROM RECOGNIZING AND IMPLEMENTING THE RIGHT OF ACCESS CLAIMED BY RESPONDENTS, AND TO RELY, INSTEAD, ON THE EXERCISE OF JOURNALISTIC DISCRETION IN THIS AREA BY BROADCAST LICENSEES WITHIN THE FRAMEWORK OF THEIR OBLIGATIONS UNDER THE FAIRNESS DOCTRINE

A. THE FAIRNESS DOCTRINE IS THE FUNDAMENTAL SAFEGUARD OF THE PUBLIC'S FIRST AMENDMENT INTEREST IN BROADCASTING

Congress brought order to the chaotic state of broadcasting in 1927 by repudiating the doctrine that "anyone who will may transmit" and replacing it with the principle "that the right of the public to service is superior to the right of any individual * * *."[11] In the Radio Act of 1927[12] and the Communications Act of 1934,[13] which essentially reenacted the earlier law,[14] Congress preserved public ownership of broadcasting channels,[15] provided that broadcasters would be licensed and regulated on the basis of "public convenience, interest or necessity,"[16] set up an expert administrative agency "to carry out its legislative policy,"[17] and charged the agency with the duty of promoting "the larger and more effective

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[11] 67 Cong. Rec. 5479 (remarks of Congressman White), quoted in *Red Lion*, *supra*, 395 U.S. at 376 n. 5.

[12] 44 Stat. 1162, as amended, 46 Stat. 844.

[13] 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*

[14] *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137.

[15] See 47 U.S.C. 301, 304, 309(h)(1).

[16] 47 U.S.C. 303, 307, 309.

[17] *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, *supra*, 309 U.S. at 138.

use of radio in the public interest."[18] As this Court stated in *Pottsville Broadcasting, supra,* 309 U.S. at 138, "Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors * * *."

From the beginning Congress has recognized that commercial broadcasting is closely related to First Amendment interests.[19] While the Commission may not "interfere with the right of free speech by means of radio communication," 47 U.S.C. 326, it has the duty to regulate broadcasting in the public interest, which includes the public's "collective right to have the medium function consistently with the ends and purposes of the First Amendment." *Red Lion, supra,* 395 U.S. at 390.

These objectives have remained in the forefront of broadcast regulation. Only two years after passage of the Federal Radio Act of 1927, 44 Stat. 1162, the predecessor of the Federal Communications Commission held that the "public interest requires ample play for the free and fair competition of opposing views, and * * * the principle applies * * * to all discussions of issues of importance to the public."[20] As radio and television assumed greater importance

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[18] 47 U.S.C. 303(g).

[19] See *Red Lion, supra,* 395 U.S. at 389; *Farmers Union* v. *WDAY, Inc.,* 360 U.S. 525, 529.

[20] *Great Lakes Broadcasting Co.,* 3 F.R.C. Ann. Rep. 32, 33 (1929), reversed on other grounds, 37 F. 2d 993 (C.A. D.C.), petition for certiorari dismissed, 281 U.S. 706.

in our society, the Commission's responsibilities increased accordingly and a regulatory system evolved from these basic precepts.

Thus, with the subsequent approval of Congress (47 U.S.C. 315(a)) and this Court (*Red Lion, supra,* 395 U.S. at 386–401), the Commission developed the Fairness Doctrine, based on the premise that under the Communications Act a broadcast licensee must operate as public trustee.[21] As such, the licensee has a "two-fold duty": to "give adequate coverage to public issues," and to give coverage that is "fair in that it accurately reflects the opposing views." *Red Lion, supra,* 395 U.S. at 377. "This must be done at the broadcaster's own expense if sponsorship is unavailable. *Cullman Broadcasting Co.,* 25 P. & F. Radio Reg. 895 (1963). Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source." *Id.* at 377–378. In satisfying these duties, the licensee must make a "diligent, positive and continuing effort * * *to discover and fulfill the tastes, needs and desires of his * * * service area." *En banc Program Policy Statement,*

[21] See, *e.g., En Banc Program Policy,* 25 Fed. Reg. 7291, 7294:

> The licensee is, in effect, a "trustee" in the sense that his license to operate his station imposes upon him a non-delegable duty to serve the public interest in the community he had chosen to represent as a broadcaster.
>
> Great confidence and trust are placed in the citizens who have qualified as broadcasters. The primary duty and privilege to select the material to be broadcast to his audience and the operation of his component of this powerful medium of communication is left in his hands.

25 Fed. Reg. 7291, 7295.[22] The consequence of failure by the licensee to meet these obligations is, as Judge McGowan stated in his dissent in this case (App. 490), loss of the right to broadcast.

In this respect, freedom of broadcast journalism is subordinated to the public's interest in hearing diverse views on matters of public importance and the "paramount" rights of the listeners and viewers are thereby served. See *Red Lion, supra,* 395 U.S. at 389–390. But journalistic discretion must nevertheless be exercised. The broadcaster must still decide how to allocate time between entertainment and non-entertainment programs and how much time to devote to specialized programming on matters such as science, religion, sports, news, education, public affairs, and the interests of minority groups. And with respect to questions of public importance, the "licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view." *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, 1251.

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[22] See, with respect to the licensee's duty to ascertain community needs and interests, *Suburban Broadcasters,* 30 F.C.C. 1021, affirmed, *Henry* v. *Federal Communications Commission,* 302 F. 2d 191 (C.A.D.C.); *Minshall Broadcasting Co.,* 11 F.C.C. 2d 796; *City of Camden,* 18 F.C.C. 2d 412, 418–426 and n. 22; *Primer on Ascertainment of Problems by Broadcast Applicants,* 27 F.C.C. 2d 650.

B. SO LONG AS THE COMMISSION'S REGULATORY PROGRAM SERVES THE PUBLIC INTEREST IN WAYS THAT ARE CONSISTENT WITH FIRST AMENDMENT VALUES, THE CONSTITUTION DOES NOT REQUIRE THE COMMISSION TO ADOPT A PARTICULAR AFFIRMATIVE REGULATORY POLICY THAT ARGUABLY MIGHT FURTHER FREEDOM OF SPEECH IF THE COMMISSION HAS REASONABLE GROUNDS FOR REFUSING TO DO SO

In this case, there has been no showing that any broadcaster failed "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U.S.C. 315(a). BEM did not demonstrate that its profferred views were novel or different in substance from anti-Vietnam war views already carried on WTOP; and DNC, in seeking a declaratory ruling, made no claim that any particular broadcaster had violated the Fairness Doctrine.[23] The court of appeals nonetheless decided that the First Amendment requires broadcasters to sell advertising time to persons wishing to discuss issues already fully and fairly presented by the station. We submit that the court's holding is, in substance, essentially a disagreement with the Commission on a policy matter that Congress properly entrusted to the agency.

The court of appeals recognized that the licensee's responsibility for the presentation of controversial issues of public importance under the Fairness Doctrine serves the public's right to hear debate on controversial public issues. But, in the court's opinion, the public has an additional interest "in the mode or

[23] Hence, this is not a case involving "a discriminatory refusal [by the Commission] to require the licensee to broadcast certain views which have been denied access to the airwaves." *Red Lion*, *supra*, 395 U.S. at 396.

manner—as well as the content—of public debate aired in the broadcast media" (App. 466); individuals and groups have a First Amendment interest "in effective self-expression" (App. 467). Although in *Red Lion* this Court held that there is no "unabridgeable First Amendment right to broadcast," 395 U.S. at 388, the court below found in the First Amendment a "reasonably regulated, 'abridgeable' right to speak" over the airwaves (App. 467). The licensee's initiation and control of the presentation of controversial public issues, even subject to the requirements of the Commission's Fairness Doctrine, do not, in the court's view, satisfy the First Amendment because they represent only the broadcaster's view of what is important; in addition, some members of the public must have initiative and control over self-expression independent of the licensee's responsibility to determine what shall be broadcast, at least so long as commercial advertisements are accepted. But the court stated that the "abridgeable" First Amendment right of access it defined must be limited and cannot be exercised by all members of the public. Consequently, the plaintiffs in these cases are not necessarily entitled to present their announcements on the air. Instead, the court ordered the Commission to adopt "a scheme of reasonable regulation" that would govern the selling of time for editorial advertising in light of the court's holding that licensees must grant access to some (App. 486).

The Commission and the court below are agreed that broadcast regulation must be guided by the public's First Amendment interests in the communications

media; indeed, Congress and the Commission have recognized this from the outset. And it is common ground that the public has an interest not only in the content of the discussion of controversial public issues, but also, as the court of appeals put it, "in the mode or manner" of the presentation (App. 466); the Commission made this clear when it stated in *DNC* that a "licensee policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner would run counter to the 'profound national commitment that debate on public issues should be uninhibited, robust, and wide-open'" (App. 259).[24] There is also no dispute about the court's statement that the public has an interest "in effective self-expression" (App. 467); the Commission itself here warned against the exclusion of "partisan voices" (App. 259).[25]

Rather, the point of departure is that these considerations have led the Commission to develop the Fairness Doctrine, whereas the same considerations led the court of appeals to create what it termed an "abridgeable" right of access. It is apparent that the court's result is far from manifest in the Constitution's command that "Congress shall make no law * * * abridging the freedom of speech * * *." Indeed, the lan-

[24] See also *Storer Broadcasting Co.*, 11 F.C.C. 2d 678; *Anti-Defamation League of B'nai B'rith*, 4 F.C.C. 2d 190, 191, affirmed, 403 F. 2d 169, 170 (C.A.D.C.); certiorari denied, 394 U.S. 930.

[25] See also *Red Lion*, *supra*, 395 U.S. at 392, n. 18 ("The expression of views opposing those which broadcasters permit to be aired in the first place need not be confined solely to the broadcasters themselves as proxies.").

guage of the First Amendment scarcely appears to mandate an "abridgeable right" regulated by Commission rules that delineate when an individual may and may not exercise it.

The difficulty is that this is not a traditional First Amendment case involving negative restraints on governmental action. Instead, the question here is whether the government must take certain affirmative action to promote freedom of speech or, more precisely, whether the Commission must institute a regulatory scheme outlawing bans on editorial advertisements in an attempt to promote the public's First Amendment interest in broadcasting. That is a practical question, involving many complexities of implementation as well as potentially far-reaching consequences for the broadcast media and their regulation—a question peculiary suited to administrative determination. If, as in this case, a court decides in favor of such an affirmative regulatory policy solely in terms of what it divines from the First Amendment, then the Commission is ousted from its role of deciding how the public's interest in broadcasting can best be promoted and Congress is rendered powerless to change the court's result. This is not the way such significant regulatory decisions should be made; and it is not the way Congress intended them to be made with respect to broadcasting.

Professor Zechariah Chafee put it well:[26]

> Once we get away from the bare words of the [First] Amendment, we must construe it as

[26] II Chafee, *Government and Mass Communications* 640-641 (1949).

part of a Constitution which creates a government for the purpose of performing several very important tasks. The [First] Amendment should be interpreted so as not to cripple the regular work of the government. A part of this work is the regulation of interstate and foreign commerce, and this has come in our modern age to include the job of parceling out the air among broadcasters, which Congress has intrusted to the FCC. Therefore, every free-speech problem in the radio has to be considered with reference to the satisfactory performance of this job as well as to the value of open discussion. Although free speech should weigh heavily in the scale in the event of conflict, still the Commission should be given ample scope to do its job.[27]

This correctly indicates, we believe, that when the Commission formulates regulations for encouraging free discussion over the airwaves, it must act consistently with the First Amendment and that whether it has done so depends not only on the objective but also on the means adopted to achieve it. See *Red Lion, supra.* Likewise, when the Commission refuses to undertake a particular affirmative regulatory policy that arguably would promote freedom of speech, its refusal must be reasonable[28] or, as Judge McGowan

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[27] Professor Chafee added that the First Amendment prevents the Commission from engaging in two kinds of activity: censorship and prejudicial administration that penalizes "the expression of particular ideas." *Id.* at 641–642.

[28] See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 177.

speech in the communications media—suggests both regulation and non-regulation and that the appropriate courses to follow in this complex field could be effectively marked "neither directly through self-executing legislation nor by the judicial process." *Pottsville Broadcasting, supra,* 309 U.S. at 142. Moreover, when we deal with any proposed governmental policy to promote First Amendment interests in broadcasting, it is well to remember Professor Chafee's warning that "there is no bright line between encouragement and repression." [30] Before the attempt is made, there should be careful and thorough consideration of the future consequences and of the need for further affirmative action in light of the existing regulatory system and technological developments.[31]

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[30] II Chafee, *supra,* at 710; see also *id.* at 709:

> Whenever anybody is inclined to look to the government for help in making the mass media do what we desire of them, he had better ask himself one antiseptic question: "Am I envisaging myself as the official who is going to administer the policy which seems to me so good?" Justice Holmes remarked that, when socialism came, he hoped he would be "on the committee." You and I are not going to be on the committee which is charged with making newspapers or radio scripts better written and more accurate and impartial. It is very easy to assume that splendid fellows in our crowd will be exercising the large powers over the flow of facts and opinions which seem to us essential to save society, but that is an iridescent dream. We must be prepared to take our chances with the kind of politicians we particularly dislike, because that is what we may get.

[31] In its decision in *DNC,* the Commission noted that it recognized the need to foster "a multitude of voices in the discussion of public issues" and stated that it "is seeking to promote a new technology which can make a most significant contribution in

This in turn demands the kind of searching inquiry the Commission began before the court of appeals rendered its decision[32] and thereby, in Judge McGowan's words, "dictate[d] the result in advance" (App. 491).[33]

In addition, when the issue is whether regulations should be adopted to advance the public's First Amendment interest there are many practical considerations that have to be taken into account, not the least of which is whether the Commission is equipped to handle the particular task. "[T]he Federal Communications Commission * * * would ill serve the public interest if the courts"—and, we should add, the Commission itself—"imposed such heavy burdens on [it] as to overtax [its] capacities."[34] In the end, the

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this respect—cable television. Because of the potentially great number of channels, cable opens up the possibility of common carrier channels, public access channels, etc." (App. 265–266). See *United States* v. *Midwest Video Corp.*, No. 71–506, decided June 7, 1972.

In its proposed rules on cable television the Commission has provided that, with respect to cable systems in major television markets, the system must have a number of different kinds of access channels. See 37 Fed. Reg. 3289, Section 76.251. For example, Section 76.251(a)(4) provides:

> * * * Each such system shall maintain at least one specially designated, noncommercial public access channel available on a first-come, nondiscriminatory basis. The system shall maintain and have available for public use at least the minimal equipment and facilities necessary for the production of programing for such a channel. * * *

[32] See pp. 13–15; 18–20 *supra*.

[33] See *American Commercial Lines, Inc.* v. *Louisville & Nashville R.R. Co.*, 392 U.S. 571, 591–592, where the Interstate Commerce Commission, in an individual rate reduction proceeding, determined to continue following the practice it had adhered

Commission might conclude that although the aim is worthy, the means available for achieving it counsel against pursuing the particular course that has been advocated. However, this is not a conclusion open to the Commission under the decision of the court of appeals in this case, although as Judge McGowan stated in dissent (App. 490):

> The Commission has, at the least, been set a task of heroic proportions, and one whose very complexities may undermine the premise upon which it is founded. The question is whether the Constitution requires that it be undertaken. I am not convinced that it does. * * *

In sum, we believe that the Constitution permits a range of legislative choices regarding how the public's interest in freedom of speech over the airwaves is to be advanced, that in the absence of specific direction by Congress the Commission has leeway to decide not to adopt a particular course so long as it has reasonable grounds for refraining so to act and so long as the regulatory scheme it has adopted is consistent

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to in the past, although it intended to consider the issues there presented in a rulemaking proceeding where it could assess the industry-wide effect of a change in policy.

The Court there held that "We can see no justification for denying the Commission reasonable latitude to decide where it will resolve these complex issues, in addition to how it will resolve them. The action by the District Court here not only deprives the Commission of the opportunity to make the initial resolution of the issues but also prevents it from doing so in a more suitable context." *Id.* at 592.

The posture of the present case is remarkably similar to that of *American Commercial Lines.*

[34] *Office of Communications of the United Church of Christ* v. *Federal Communications Commission*, 359 F. 2d 994, 1005 (C.A. D.C.).

with First Amendment values, and that the court of appeals erred in holding otherwise. The remainder of our brief is devoted to showing that the Commission's decisions here were reasonable and in accordance with the regulatory structure Congress enacted.

C. THE COMMISSION'S DECISIONS HERE WERE IN ACCORDANCE WITH THE REGULATORY SCHEME CONGRESS ENACTED AND WERE REASONABLE IN THE CONTEXT OF THE SAFEGUARDS THAT THE FAIRNESS DOCTRINE AFFORDS THE PUBLIC

1. Broadcasters Are Not Common Carriers

Congress has chosen to promote broadcasting in the United States within the structure of the private enterprise system. Congress could have established another method but, in light of the inherent limitations on access to broadcasting, expressly "rejected the idea of the licensee being required to act as a common carrier with respect to transmission of comment on public issues" (Commission's opinion in *DNC,* App. 260). Section 3(h) of the Act, 47 U.S.C. 153(h), specifically provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." [35]

In its report on H.R. 9971, 69th Cong., the bill which became the Radio Act of 1927, the Senate Commerce Committee recommended a provision re-

[35] This provision also served to distinguish radio broadcasting from the Commission's common carrier jurisdiction, which in 1934 was transferred from the Interstate Commerce Commission to the Federal Communications Commission by Section 2(a) and Sections 201–223 of the Communications Act, 48 Stat. 1064, 1070, as amended, 47 U.S.C. 152(a), 201–223.

quiring licensees, as common carriers, to allow access in connection with public issue broadcasts. S. Rep. No. 722, 69th Cong., 1st Sess., p. 4. The provision stated (67 Cong. Rec. 12502, 12503): "if any licensee shall permit a broadcasting station to be used * * * for the discussion of any question affecting the public, he shall make no discrimination as to the use of such broadcasting station, and with respect to said matters the licensee shall be deemed a common carrier in interstate commerce: *provided*, that such licensee shall have no power to censor the material broadcast * * *. But Senator Dill, the Committee Chairman, objected that such a provision would be unworkable because it would force the broadcaster to "accept anything and everything that was offered him so long as the price was paid" (67 Cong. Rec. 12502). He argued that broadcasters would be forced "to give all their time to that kind of discussion or no public question could be discussed" (67 Cong. Rec. 12504). Senator Dill offered an amendment on the floor to eliminate the common carrier obligation and to limit the access requirement to candidates for public office. 67 Cong. Rec. 12501–12505.[36] The Senate adopted Senator Dill's amend-

[36] Senator Dill pointed out that (67 Cong. Rec. 12502):

* * * under the common-carrier provision a radio station is compelled to take any kind of broadcasting that anybody wants to offer, which would mean that it would take anybody who came in order of the person presenting himself and would be compelled to broadcast for an hour's time speeches of any kind they wanted to broadcast. This provision simply says that if a radio station permits one candidate for a public office to address the listener it must

ment (67 Cong. Rec. 12501–12505) and this was later accepted in the conference report, H.R. Rep. No. 1886, 69th Cong., 2d Sess., pp. 10, 14. As enacted, the amendment became Section 18 of the Radio Act of 1927, 44 Stat. 1170, and after re-enactment, Section 315 of the Communications Act of 1934, 48 Stat. 1088, 47 U.S.C. 315.[37]

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allow all candidates for the public office to do so, and to that extent there must be no discrimination.

Senator Howell objected that (67 Cong. Rec. 12504):

> The Senator from Washington has left in the bill a provision respecting candidates. It is important, but it has not anything like the importance of the provision he has stricken out—the discussion of public questions.

But Senator Dill replied (*id.*):

> I sympathize with a great deal of what the Senator is saying, but I want to remind the Senator of the danger of having the words "public questions" in the bill.
>
> That is such a general term that there is probably no question of any interest whatsoever that could be discussed but that the other side of it could demand time; and thus a radio station would be placed in the position that the Senator from Iowa mentions about candidates, namely, that they would have to give all their time to that kind of discussion, or no public question could be discussed.

[37] In exercising its discretion, the broadcaster would fail to carry out its obligations to the public if it did not make time available to candidates for political office on a reasonable basis, since the purpose of Section 315 "is to facilitate political debate over radio and television." *Farmers Union* v. *WDAY*, 360 U.S. 525, 534; see F.C.C. Memorandum on Second Sentence of Section 315(a), in *Political Broadcasts—Equal Time*, Hearings before Subcommittee of the House Interstate and Foreign Commerce Committee, 88th Cong., 1st Sess., on H.J. Res. 247, pp. 84–90; see also *En Banc Program Policy Statement*, 25 Fed. Reg. 7291. Congress has now codified this duty to the limited extent of permitting the Commission to revoke licenses "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable

The importance of this legislative history, which the court below failed to discuss, is apparent. The court of appeals described its decision as merely a "modest reform" and therefore not inconsistent with Section 3(h) (App. 482–483). But to the extent that the licensee is required to sell time and is enjoined from exercising journalistic discretion regarding such factors as what persons should serve as spokesmen for a particular viewpoint on a public issue, what type of format this view should be presented in, how much time should be devoted to the particular presentation, and how frequently the view should be aired, then the licensee tends to become a common carrier with respect to public issues.[38] The decision below pushes broadcasting very far in that direction and does so on the basis of reasoning that goes beyond the narrow limits proclaimed at the beginning of the opinion (App. 449).

Thus, the court warns against judging "any sort of speech on public issues worthless" (App. 473) and states that even when a licensee has fully complied with the Fairness Doctrine with respect to a certain issue

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amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." Section 103(a)(2)(A), P.L. 92–225, approved February 7, 1972. Congress also revised the language of Section 315, *supra*, by adding the following italicized words: "no obligation is imposed *under this subsection* upon any licensee to allow the use of its station by any such candidate." Section 103(b)(2)(B). Except to the extent modified, Congress has adhered to the original policy adopted in 1927.

[38] As the Commission stated in *DNC*, the result would be "a near-absolute right of any person who has the money to buy time" (App. 267).

such as the Vietnam war, the licensee must nevertheless sell time because "it is not *necessarily* clear that a particular antiwar editorial advertisement would add nothing to the public's information and understanding" (App. 471–472, emphasis in original). In addition, the court finds the Fairness Doctrine inadequate because "when an individual or group buys time to say its piece, the crucial controls are in its own hands" (App. 468). In our view, these statements, as well as others that served as a ground for the decision, indicate that the court did significantly more than institute a "modest reform." Instead, the court turned the question of access into a matter of constitutionl compulsion and, in the process, apparently transformed each refusal to sell time for editorial advertising into a First Amendment issue to be decided ultimately by the courts.

The evident intent of Congress not to go so far cannot be dismised with the assertion that the First Amendment nevertheless demands more. Congress "could surely have decreed that each frequency should be shared among all or some of those who wish to use it," *Red Lion, supra,* 395 U.S. at 390–391; it could have obligated licensees to act as common carriers; or it could have forbidden advertisements entirely. Congress chose instead to regulate the airwaves through the system of commercial broadcasting we have described above and, as Judge McGowan stated in dissent, "[t]his approach has never been thought to be other than within the permissible limits of constitutional choice" (App. 490). In light of Congress'

direction in Section 3(h), the Commission reasonably refused to recognize an individual right of access as broad as that suggested by the court below; but the Commission did begin a comprehensive inquiry to determine whether there is any "feasible method of providing access for discussion of public issues outside the requirements of the fairness doctrine," 30 F.C.C. 2d at 33 (see pp. 13–15 *supra*). This, we submit, is not only a constitutionally permissible approach, but also a sound method of dealing with such significant regulatory matters; indeed, it is precisely because of the need for proceeding in this way that Congress set up an administrative agency to handle the task.[39]

2. In the framework of commercial broadcasting prescribed by Congress, the Fairness Doctrine provides reasonable public access without discrimination and thereby satisfies First Amendment requirements

When the Commission's requirements under the Fairness Doctrine are compared with the requirements imposed by the court of appeals on the basis of its view of the First Amendment, it becomes evident that the court's disagreement with the Commission essentially involves policy differences about the manner in which broadcasters, as public trustees, ought to make their frequencies available for the discussion of public issues. The Commission has long held that under the Fairness Doctrine, licensees may not "themselves make radio unavailable as a medium

[39] See note 33 *supra*, discussing *American Commercial Lines, Inc.* v. *Louisville & Nashville R.R. Co.*, 392 U.S. 571, 591–592.

of free speech." *Report on Editorializing, supra,* 13 F.C.C. at 1248. Broadcasters must seek out spokesmen to present representative and contrasting views on controversial issues of public importance, although they may exercise journalistic discretion in selecting representative spokesmen and in determining what format shall be used for the presentations. This duty is a binding condition of the right to broadcast. See, *e.g., Fairness Primer,* 29 Fed. Reg. 10415; *En Banc Program Policy Statement,* 25 Fed. Reg. 7291; *Primer on Ascertainment of Community Problems by Broadcast Applicants,* 36 Fed. Reg. 4092.

This indeed was the thrust of *United Broadcasting Co.* (WHKC), 10 F.C.C. 515, relied on by the court of appeals (App. 487).[40] This 1945 decision is among many that contributed to the still-evolving Fairness Doctrine. The Commission there emphasized, as it later observed in the landmark *Report on Editorializing,* that the broadcaster's duty includes making

[40] In *United Broadcasting* a labor organization charged that a Columbus, Ohio, radio station, WHKC, refused to broadcast programs which solicited membership or discussed controversial subjects, such as race, religion, or politics; that it discriminated in administering this policy, and that it censored scripts. The case was settled. The station agreed that it would consider every request for time to broadcast concerning controversial public issues in an open minded and impartial manner; that requests for such time would be considered in light of its contribution to a balanced program schedule; and that the station would make time available for the full and free discussion of public issues on a nondiscriminatory basis. In approving the agreement, the Commission stated that "operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues" was inconsistent with the Communications Act's public interest standard. 10 F.C.C. at 518.

responsible provision for the discussion of controversial issues of public importance in the community served and making sufficient time available for a full discussion of those issues. 13 F.C.C. at 1249. But as the Fairness Doctrine developed, the Commission found that it was not necessarily required, as dicta in *United Broadcasting* had indicated, that broadcasters *sell* time to private individuals so long as the broadcaster used his facilities as a forum for discussion of public issues. Thus, after thorough study of the matter, the Commission came to the following conclusion in its *Report on Editorializing,* 13 F.C.C. at 1251–1252:

> It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making

> the request. The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist. Undoubtedly, over a period of time some licensees may make honest errors of judgment. But there can be no doubt that any licensee honestly desiring to live up to its obligation to serve the public interest and making a reasonable effort to do so, will be able to achieve a fair and satisfactory resolution of these problems in the light of the specific facts.[41]

Although BEM failed to show that WTOP had not complied with these standards (App. 362–363), the Commission stressed that WTOP had a continuing duty to present a variety of views on the Vietnam

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[41] Because of this duty, the cases involving access to a regulated forum relied upon by the court of appeals are inapposite. *Lee* v. *Board of Regents of State Colleges*, 306 F. Supp. 1097 (W. D. Wis.), affirmed, 441 F. 2d 1257 (C.A. 7); *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D.N.Y.); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y.); *Hillside Community Church, Inc.* v. *City of Tacoma* 455 P. 2d 350 (Wash.); *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Reptr. 430, 434 P. 2d 982 (Cal.). These are all cases in which those responsible for access to an advertising forum have no corresponding responsibility to assure balanced coverage of contending positions; nor are there special considerations, as here, suggesting that such an obligation should be imposed. In those cases, the question was simply whether the ideas expressed in editorial advertising were to be given access to the forum at all. Under the broadcasters' public interest obligations and the fairness doctrine, however, controversial questions of public importance must be given access to the broadcast forum, although the format for their presentation is subject to licensee discretion.

war, including views such as those advocated by BEM (App. 361–362). However, the Commission held that in the absence of a violation of the Fairness Doctrine, BEM had no "right" to buy time and WTOP had no duty to sell (App. 368). And the court of appeals itself stopped short of holding that WTOP necessarily must sell time to BEM (App. 488).

With respect to the *DNC* case, the networks are presently under a duty to present the views of major political parties on national issues, and they have done so in the context of news broadcasts and interviews, and in special presentations (App. 252). For example, in *Columbia Broadcasting System, Inc.* v. *Federal Communications Commission*, 454 F. 2d 1018 (C.A. D.C.), the court of appeals recently held that the CBS network acted pursuant to the Fairness Doctrine in offering broadcast time to the Chairman of DNC to present the views of the Democratic Party in a format to be determined by him. Similarly, the court sustained the American Broadcasting Company in its grant of time to DNC to present its views on the Vietnam war.[42] And as the statement indicates, *supra*, p. 9 n. 5, the National Broadcasting Company has no general policy against the sale of time to major political parties for broadcasts on public issues (App. 47). Thus, each of the major national networks, in diverse ways in fact makes time available to individuals and groups who wish to speak out on the issues of the day.

[42] See *Democratic National Committee* v. *Federal Communications Commission*, C.A.D.C. No. 71–1637, decided February 2, 1972, petition for a writ of certiorari filed April 28, 1972, No. 71-1405.

Under the Fairness Doctrine they must do so as part of their obligation as public trustees.

But the court of appeals concluded "that the fairness doctrine's goal of full and fair coverage of issues on normal programming time does not eliminate the public's interest in a further, complementary airing of controversial views during advertising time" (App. 473). The court also held that since broadcasters had opened "up a forum for some paid presentations, independently edited and controlled by members of the public" (App. 477), it is discriminatory for them not to sell such time to persons wishing to express their views on public issues, even though a broadcaster may be permitted under the Constitution to refuse to accept any advertisements of any sort (App. 475).

The court based these conclusions, however, on the incorrect premise that there is for this purpose a constitutionally significant distinction between programming and advertising time, that the broadcast day should be broken down into segments, each considered in isolation. The Communications Act makes no such distinction; the broadcaster's responsibility as a public trustee extends to every minute of every hour the station is on the air.[43] And the "forum" is the entire broadcast day, of which advertising is simply one component part.

To be sure, a station will usually exercise less control over advertisements than over its own programs, although when network programs are carried the

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[43] See, *e.g.*, *En Banc Program Policy Statement*, 25 Fed. Reg. 7291.

"crucial controls," as the court below put it, are not in the station's hands in any meaningful sense even during regular programming. But the court of appeals erred in assuming that broadcasters simply turn over or relinquish advertising time, allowing advertisers to do as they please, and that every broadcaster should do the same for editorial advertisements.[44]

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[44] See, *e.g.*, *Center for Law and Social Policy*, 23 P. & F. Radio Regulation 2d 187, 188 (1971), describing the control CBS exercises over advertisements:

> The CBS Television Network Program Practices Department (Department) has general responsibility for ensuring that "all matter transmitted by the network measures up to acceptable standards of propriety." The Department has a staff of thirty-four people in Hollywood and New York with an operating budget in excess of $650,000. The Department is headed by a network vice president, and each office is headed by a director. Five editors in New York and one in Hollywood work exclusively on commercial clearance: one additional person in each office has the responsibility for avoiding "commercial congestion;" the New York Office has four other persons to assist in the handling of advertising material; and a medical advisor reviews new medical claims and new presentations of previously substantiated claims. The clearance procedures are separate from the sale of advertising time.
>
> CBS states that advertisements are usually submitted in script or storyboard form: that all product claims are required to be substantiated; and that its staff, the advertiser and/or agency often meet to discuss the substantiation or presentation of a claim. After advertisements have been accepted for broadcast they will again be reviewed based on complaints from the public, inquiries from affiliates, or other information. A thorough review, including consultation of the CBS Law Department, is also conducted when notice of governmental agency action is received. Other sources utilized by the Department are the CBS Research Department, which examines the methodology of

Broadcasters do exercise control over advertisements and the Commission itself requires that:[45]

> every station * * * have a program to protect the public in this area. The extent of its program will, of course, depend upon the size and resources of the station, with the larger stations making a correspondingly greater effort in this field. However somewhere in every station operation (whether it be owner, manager, or staff), there must be cognizance of problems regarding deceptive or misleading advertising, familiarity with the important policies and developments in this area, and the responsibility for determining the acceptability of advertising offered to the station.

Compare *Federal Communication Commission* v. *American Broadcasting Co.*, 347 U.S. 284.

Thus, we submit that given the inevitable limitations on access to broadcasting, the question whether a licensee unconstitutionally discriminates against speech on public issues is meaningfully viewed in terms of how the licensee allocates air time between com-

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scientific studies submitted to substantiate claims; the CBS Engineering Department, which reviews such matters as claims relating to the performance of television sets; the National Safety Council; the Council of Better Business Bureaus; the American Dental Association; the Underwriters Laboratories; and relevant publications of the Federal Drug Administration, the Federal Trade Commission, etc. CBS also states that it consults with the NAB Code Authority, although "compliance with the NAB Code does not assure that a commercial is acceptable under CBS standards."

[45] *Id.* at 195; see also *Licensee Responsibility with Respect to the Broadcast of False, Misleading or Deceptive Advertising*. 23 P. & F. Radio Regulation 2d 1550 (1971).

mercial uses and public issue speech, rather than in terms of the format he chooses. The licensees' public interest duty under the Fairness Doctrine assures that broadcasters who derive their basic revenues from commercial advertising will also devote substantial air time to fair and balanced presentation of controversial issues of public importance. There is thus no invidious discrimination against the broadcasting of speech on public issues."[46]

In contrast to the court, the Commission does not make a distinction between broadcasters who accept commercial advertising and those who do not. Whether the broadcaster is serving the public interest depends on whether he is fulfilling his obligations under the Fairness Doctrine and that standard applies to commercial broadcasters such at WTOP as well as to noncommercial broadcasters, which are not covered by the court's ruling since they accept no advertising of any kind.[47] This overall approach to evaluating the licensee's performance in the public interest has been consistently followed by the Commission with the approval of both Congress and this Court, *Red Lion, supra,* 395 U.S. at 380, and indicates that, contrary

[46] For this reason, cases such as *Cox* v. *Louisiana*, 379 U.S. 536, *Fowler* v. *Rhode Island*, 345 U.S. 67, and *Niemotko* v. *Maryland*, 340 U.S. 268, are inapposite.

[47] See 47 U.S.C. 390, 392, 397, promoting the operation of noncommercial broadcasting stations. A federally chartered nonprofit corporation, the Corporation for Public Broadcasting, has been created to facilitate the development of educational broadcasting, "with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature * * * ." 47 U.S.C. 396(g)(1)(A).

to the ruling below, it does not make a constitutional difference that a commercial broadcaster accepts product advertisements.[48] At the least, the Constitution gives Congress and the Commission enough latitude to develop a reasonable regulatory scheme that makes no such distinction.[49]

3. In light of the serious problems in implementing a regulatory policy requiring licensees to accept editorial advertisements, the Commision reasonably refused to do so at this time

There are further reasons why the Commission could reasonably conclude, as it did, that although

[48] Product advertising, after all, exists in other media of communication which are not subject to the Fairness Doctrine and have no constitutional duty not to discriminate against public issue advertising.

[49] That the Commission may properly view the issue as whether the licensee has presented the point of view advocated by a particular spokesman, rather than as whether the viewpoint was presented in programming initiated or controlled by the licensee, is shown by this Court's recent affirmance of the three-judge district court's decision in *Capital Broadcasting Co.* v. *Mitchell*, Nos. 71–851, 71–919, affirmed *per curiam* Mach 27, 1972.

In that case broadcasters challenged, on First Amendment grounds, the ban on cigarette advertising in the electronic communications media set forth in the Public Health Smoking Act of 1969, 15 U.S.C. 1335. The court, with Judge Wright dissenting, rejected the broadcasters' claim that the ban suppressed debate on the smoking issue. Broadcasters could continue to disseminate information about cigarettes and were precluded only from doing so by means of advertisements on the air. Thus, the debate about smoking could continue in other formats of broadcasting.

Similarly, in this case, even if a broadcaster has a flat ban on advertisements about controversial public issues, those issues must nevertheless be presented during normal programming time and the Commission properly relied on this as adequately serving the public interest.

there is no policy against selling time for comment on public issues (App. 265), a licensee need not do so if it otherwise complies with the Fairness Doctrine. In its opinions in *DNC* and *BEM,* the Commission mentioned a number of undesirable consequences that could flow from a regulatory system, such as that contemplated by the court of appeals, outlawing flat bans on editorial advertisements.

First, the "right" recognized by the court of appeals is a constitutional right of access not for all individuals or groups but only for those wealthy enough to purchase time. In *DNC,* the Commission found this objectionable because "the public's agenda for discussion of public issues would then be set substantively and increasingly by the affluent—by the person or group which '* * * has the financial resources and interest to purchase sustained access to the mass communications media * * *' (*Banzhaf* v. *F.C.C.,* 405 F. 2d 1082 (C.A.D.C. 1968), *certiorari denied,* 396 U.S. 842)" (App. 263). And in *Red Lion* this Court expressed its disapproval of a system wherein the "highest bidders" would get the available time, 395 U.S. at 392, or, as Judge McGowan described it in dissent, a system wherein "money alone determines what issues are to be aired, and in what format" (App. 490). Indeed, one commentator has already suggested that the regulatory scheme mandated by the court below on the basis of the First Amendment is itself unconstitutional because it discriminates against the poor.[50]

[50] See Note, 85 Harv. L. Rev. 689, 694 (1972), which proposes a convoluted solution to this by a "submarket rate system," *id.* at

Next, there is the problem of rationing time among those with enough money to buy it. Commissioner Johnson, dissenting in *DNC*, proposed that this be done on a first-come, first-served basis (App. 281). But that would still mean that affluent individuals or groups could dominate the limited amount of available time by continued requests for access; moreover, if there were a long waiting list of persons wishing to air their views, an issue sought to be addressed might become stale while other, less-immediate questions were discussed. It has been suggested that "[t]hese problems could be avoided by relaxing to a limited extent the constitutional principles against content discrimination and regulatory discretion." [51] But this, we submit, only serves to illustrate further the reasonableness of the Commission's refusal to embark upon such a venture, at least not without additional study, and thereby interject itself, as never before, into the day-to-day programming decisions of broadcasters.

Moreover, consideration must be given to what effects such a regulatory system would have on the Fairness Doctrine, and, particularly, on the *Cullman* doctrine,[52] which requires broadcasters to present, at

695. Professor Jaffe criticizes this proposal because it "would raise incredible administrative problems." Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 Harv. L. Rev. 768, 789 (1972).

[51] Note, 85 Harv. L. Rev. 689, 697 (1972). In seeking to solve such problems, others have proposed that representative community boards be set up to decide which persons shall be allowed to present their opinions. Note, 39 Geo. Wash. L. Rev. 532, 568 (1971).

[52] *Cullman Broadcasting Co.*, 40 F.C.C. 576; see *Red Lion*, *supra*, 395 U.S. at 377.

their own expense if necessary, opposing views on public issues when the licensee has chosen to broadcast a program giving only one viewpoint. The premise of *Cullman* is that the licensee's voluntary choice to present one side of the issue gives rise to an affirmative duty to present opposing viewpoints. If *Cullman* nevertheless applied, each editorial advertisement could generate claims for free reply time and the licensee would thus become obligated to correct an imbalance he had not created. Commissioner Cox, concurring in *BEM*, stated: "I fully support the *Cullman* doctrine in those cases where broadcasters elect to accept sponsored controversial issue programming or paid spots, but think that to *require* them to accept such matter would unreasonably expose them to erosion of their advertising revenues" (App. 369, emphasis in original).

It was suggested below that if financial harm or other problems result, the Fairness Doctrine can simply be "suspended" [53] in this area or the Commission can make "necessary adjustments." [54] These assertions, we submit, are a further indication of the imprudence of the court of appeals' decision. For if *Cullman* does not, or cannot, apply to editorial advertisements, then the public will hear only one-sided presentations on public issues by those rich enough to buy time. That is scarcely a "better" regulatory scheme than, or a significant improvement in, the present system which requires licensees to cover public issues and present

[53] App. 281 (Commissioner Johnson dissenting in *DNC*).
[54] App. 486 (opinion of the court of appeals).

contrasting views. At the least, the Commission could reasonably conclude that the foreseeable dangers militate against instituting such a regulatory scheme at this time.

Above all else, one thing is clear: the court below has required the Commission to embark upon a course that will involve it to an unprecedented degree in determining who shall get on the air to present their particular views. Under the issue-oriented Fairness Doctrine, this is a matter that traditionally has been left to the licensee's reasonable discretion.[55] But the court has thrust the Commission into the role of arbiter, with each refusal to sell time giving rise to a potential First Amendment question. Perhaps it is not inevitable that under the court's decision the Commission would find itself forced to decide competing claims to buy limited time on the basis of criteria that favor one person's speech over another's.[56] But the possibility is a real one—and one the Commission has, from the beginning, sought to avoid as it developed the Fairness Doctrine. Indeed, the needless assumption of such a role (which amounts to a form of selective prior restraint) by a government agency would not be easy to reconcile with the First Amendment. At the very least, we think the Constitution per-

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[55] In *DNC*, however, the Commission observed that "[t]here could be a case where the licensee's policy in this area would be arbitrary (*e.g.*, when he covers the issue, and in announcements of a few seconds duration, and then refuses to let others discuss the issue on this basis). No such case is or has been before us. * * *" (App. 269, n. 13).

[56] See II Chafee, *supra*, at 709, quoted in note 30 *supra*.

mitted the Commission to choose not to run the risk of setting out on such a course in these cases,[57] and to rely instead on the safeguards of the Fairness Doctrine to assure responsible broadcast journalism.

In summary, we submit that the existing public trustee approach adopted by Congress and the Commission is a proper way of serving the public's First Amendment interests in broadcasting, and that it was thus constitutionally permissible for the Commission here to decide to continue following that approach, which leaves the question whether editorial advertisement will be accepted as a matter of journalistic discretion to be decided by the licensee. Whether further adjustments and changes are desirable or possible is a matter under consideration in the Commission's current general inquiry into the Fairness Doctrine,[58] where there will be careful and thorough study of the evidence and opinions elicited. Whether and to what degree the licensee would be able to control the views and the manner in which they are expressed, the amount of time that should be allocated to public issue advertising, the experience of licensees who accept such advertising, how disputes regarding refusals to sell time to particular applicants would be resolved, on what basis a licensee could reject certain controversial advertising—all this and much more would have to be taken into account in determining

[57] Cf. *New York Times Co.* v. *United States*, 403 U.S. 713, 733 (White, J. concurring) (refusing in another context of selective prior restraint to "start the courts down a long and hazardous road * * * without congressional guidance and direction").

[58] See *supra*, pp. 13–15.

not only what kind of regulations the Commission should adopt to implement any rule requiring that licensees accept public issue advertising, but also whether such a rule should be adopted at all.[59]

The need for engaging in this kind of far-reaching and thorough inquiry[60] before making such a signifi-

[59] In the pending inquiry, the Commission has before it a wide variety of viewpoints. Some advocate an absolute right in public issue spokesmen to broadcast their views in a manner and format of their own choosing without any right of the broadcaster to reject requests for time except on grounds of obscenity. Such proposals range from sale of time for paid spot announcements to sale of time for lengthy public issue programs and announcements both on a paid and free basis. Other submissions argue for the maintenance of the status quo, claiming that any other system would impair the balance of the Fairness Doctrine in favor of wealthy spokesmen or groups and would impose an unfair obligation on broadcasters to make free time available under the *Cullman* doctrine. Some would allow the broadcaster to deny access, but only because the particular mode of presentation does not adequately advise the public of the issues; or because what is discussed is not a controversial issue of public importance. This proposal would permit rejection of requests in the discretion of the broadcaster on an *ad hoc* basis for reasons pertaining to the public interest, but subject to review under a reasonableness standard by the Commission.

[60] The Commission had opened its general inquiry into the Fairness Doctrine before the court's decision in this case, because, among other reasons, it had since 1968 "seen the law in this field explode, as knowledgeable and aggressive parties recognized the potential, and legal availability, of the broadcast media to expound on these public issues." *Democratic National Committee* v. *Federal Communications Commission*, C.A.D.C., No. 71-1738 (decided Feb. 22, 1972). Some of the more recent court decisions dealing with the Fairness Doctrine are: *Banzhaf* v. *Federal Communications Commission*, 405 F.2d 1082 (C.A.D.C.), certiorari denied *sub nom. Tobacco Institute* v. *Federal Communications Commission*, 396 U.S. 842; *Retail Store Employees Union* v. *Federal Communications Commission*, 436 F.2d 248 (C.A.D.C.); *Neckritz* v. *Federal Communi-*

cant regulatory decision is one of the reasons why Congress created an administrative agency in this field to determine whether—as well as how—problems such as these can be surmounted. But the court of appeals has ordered the Commission up the slope without considering whether this is justified in light of the dangers and complexities of the climb; and from that order, purportedly a constitutional command, there can be no turning back.

The Constitution does not compel the court's result, but requires only that, in the context of an overall regulatory program that is consistent with the First Amendment, the Commission have reasonable grounds for deciding not to adopt a proposed affirmative policy that arguably would further encourage freedom of speech in broadcasting, such as that advocated by respondents in this case. As we have discussed above, that standard was met here, since the Commission's rejection of respondents' claims was supported by substantial considerations that have thus far led the Commission to conclude that First Amend-

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cations Commission, 446 F.2d 501, 502 (C.A. 9); *Friends' of the Earth* v. *Federal Communications Commission*, 449 F.2d 1164 (C.A.D.C.); *Green* v. *Federal Communications Commission*, 447 F.2d 323 (C.A.D.C.); *Columbia Broadcasting System, Inc.* v. *Federal Communications Commission*, 454 F.2d 1018 (C.A.D.C.); *Democratic National Committee* v. *Federal Communications Commission*, C.A.D.C. No. 71-1637, decided February 2, 1972, petition for a writ of certiorari pending, No. 71-1405, O.T. 1971; *Larus Brothers* v. *Federal Communications Commission*, 447 F.2d 876 (C.A. 4); *Democratic National Committee* v. *Federal Communications Commission*, C.A.D.C. No. 71-1738, decided February 22, 1972; *Healey* v. *Federal Communications Commission*, C.A.D.C. No. 24,630, decided March 3, 1972.

ment values in this area will be better served by continued reliance on the journalistic discretion of broadcasters operating in compliance with their obligations under the Fairness Doctrine. Accordingly, the court below should have affirmed the Commission's decisions.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-863

COLUMBIA BROADCASTING SYSTEM, INC., *Petitioner,*

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL., *Respondents.*

No. 71-864

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES, *Petitioners,*

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE AND DEMOCRATIC NATIONAL COMMITTEE, *Respondents.*

No. 71-866

AMERICAN BROADCASTING COMPANIES, INC., *Petitioner,*

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT DEMOCRATIC NATIONAL COMMITTEE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-863

COLUMBIA BROADCASTING SYSTEM, INC., *Petitioner,*

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL., *Respondents.*

No. 71-864

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES, *Petitioners,*

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE AND DEMOCRATIC NATIONAL COMMITTEE, *Respondents.*

No. 71-866

AMERICAN BROADCASTING COMPANIES, INC., *Petitioner,*

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT DEMOCRATIC NATIONAL COMMITTEE

OPINIONS BELOW

The opinion of the Court of Appeals (App. 446) is reported at 450 F.2d 642 (1971). The opinion of the Federal Communications Commission (App. 247) is

reported at 25 F.C.C. 2d 216 (1970). The opinion of the Federal Communications Commission in *Business Executives' Move for Vietnam Peace* (App. 357) is reported at 25 F.C.C. 2d 242 (1970).

JURISDICTION

The judgment of the Court of Appeals (App. 492) was entered on August 3, 1971. Petitions for rehearing were denied October 4, 1971 (App. 494). Petitions for certiorari were filed January 3, 1972, and granted February 28, 1972 and the cases consolidated with No. 71-865. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the First and Fifth Amendments and of the Communications Act are set forth in the Addendum, pp. 1a-4a, *infra*.

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission may, consistently with the provisions of the Communications Act of 1934 that it promote the public interest and not interfere with the right of free speech, approve an absolute ban of all radio and television broadcasts paid for by a national political party on issues of public importance, while at the same time broadcast licensees accept paid advertisements on subjects which they do not deem "controversial."

2. Whether the Federal Communications Commission's approval of such an absolute ban on broadcasts paid for by a national political party is consistent with the First and Fifth Amendments.

STATEMENT

On May 19, 1970 the Democratic National Committee (DNC), governing body of the National Democratic Party between conventions, filed with the Federal Communications Commission a request for a declaratory ruling under 5 U.S.C. § 554(e). (App. 15.) The request stated that the DNC was planning a nationwide fundraising campaign as part of which it desired to purchase program and spot announcement time, at regular rates, on individual radio and television stations and on national networks. The planned paid-for presentations would be devoted in some cases to solicitation of funds, in others to presenting the DNC's views on issues of public importance. (App. 16-17.) The DNC stated that "In 1970 America, this is the only way the DNC can effectively reach large numbers of small contributors to the extent necessary to satisfy its indebtedness and to promote adequately its candidates and causes." (App. 16.)

The DNC noted that the CBS television network had already refused a DNC request to purchase a one-half hour segment of prime time for a program on current issues which would have included an appeal for funds, and that a CBS executive had said that no time would be sold "for presenting currently controversial points of view" except during an undefined period of "election campaigns." (App. 22-23.) It also stated that the ABC network and numerous individual broadcast licensees refuse as a general policy to sell time for fund solicitations. (App. 23-24.) In addition, it had discovered that the 509 commercial VHF television stations, 180 commercial UHF television stations, 4,280 standard broadcast stations, and 2,111 commercial FM stations followed a variety of policies. Some of these broadcast

licensees would ban purchase of time by the DNC because fund solicitation was involved; some because the broadcasts would contain "controversial material on a major political issue of the day;" some because no "election campaign" was currently in progress. (App. 24-25.) The DNC said that because of the uncertainty resulting from these varying prohibitions, without clarification from the Commission it would not be in a position to proceed with its planned broadcasts. (App. 22.)

The DNC informed the Commission that it did "not contend, that broadcasters are precluded from establishing reasonable restrictions regarding the use by others of the facilities for which they hold licenses." (App. 28.) It stated that "it is not necessary for the Commission to rule that a broadcaster must present programs or announcements of any particular nature proffered by any particular concern." (App. 33.) The DNC requested the Commission to rule that "a broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as the DNC, for the solicitation of funds and for comment on public issues," or alternatively that any such general policy would be considered adversely to a broadcast licensee in evaluating its service of the public interest. (App. 33-34.)

The Commission requested comments from the three major broadcasting networks. (App. 35-38.) ABC replied that

> "ABC will determine what subjects are of such interest or importance as to warrant time for their presentation. ABC will also decide whether it will present a contrasting viewpoint itself, or if not, which individuals or organizations seeking time are best qualified to discuss a subject chosen for

broadcast treatment or are most representative of a viewpoint selected for presentation.

"In short, absent special public issue considerations, ABC will not sell time for comment on controversial issues or for solicitation of funds." (App. 45.)[1]

CBS stated that there was a "long standing CBS policy not to sell time for the expression of viewpoints on public issues" (App. 51), except for "broadcasts on behalf of political candidates or in connection with ballot propositions" (App. 57.)[2] It commented that "A policy of selling time to partisans would in our view necessarily distort the manner in which issues were presented to the listening and viewing public," possibly resulting in "one-sided presentations designed to persuade rather than to inform." (App. 51, 60.) CBS said that its own news organization had "a well-deserved reputation for fairness and objectivity," that it "has long maintained policies which in general provide that broadcasts dealing with current controversial issues be produced under the supervision and control of CBS News or a CBS Owned station," and that "only by lodging these responsibilities with our own personnel can we effectively insure that objectivity and fairness will actually be achieved." (App. 50-51.) It cited as its "fundamental conviction" the view that what the public needs is "some sensemaking whole" provided by CBS, and that this "demands the interven-

[1] ABC added, without elaboration, that it would be prepared to accept orders from major political parties to the extent they could be accommodated on a reasonable basis. (App. 46.)

[2] CBS stated that it would permit political parties to purchase "a special category of spot announcements (i.e. up to one minute in length) for the purpose of political fund-raising." (App. 58.)

tion of professional journalists between the event and the public." (App. 56-57.)[3]

NBC advised the Commission that it had no policy preventing sale of program time in the circumstances outlined by the DNC.

On August 5, 1970, the Commission adopted an opinion and order. (App. 247-273.) The Commission acknowledged that

> "DNC notes that it is seeking not a ruling which would require a broadcaster to accept particular programs or announcements, but only that broadcasters may not establish arbitrary barriers to access by responsible groups. . . . " (App. 250-251.)

The Commission rejected DNC's request with respect to purchase of time to discuss public issues. (App. 273.) One Commissioner concurred separately and one dissented. (App. 273-287.) The Commission treated DNC's request insofar as it pertained to time for fundraising as separable, and held that where fundraising was concerned, "arbitrary policies with respect to the sale of broadcast time to significant political parties for the solicitation of funds" were not permissible. (App. 272-273.)[4]

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[3] To demonstrate its scheduled coverage of news and "important subjects" in addition to "hard news" programs and special broadcasts, CBS enumerated the weekly "Face the Nation," the monthly "60 Minutes," "Look Up and Live," and "Lamp Unto My Feet," as well as its subsidiary WCBS-TV's "Newsmakers." (App. 51-52.) It also included a lengthy exhibit of excerpts from news broadcasts and editorials on the Vietnam War (App. 81-242.) See n.66, *infra*.

[4] The Commission made no findings with respect to whether CBS, ABC, or any other network or licensee had met its general statutory obligations of fairness and serving the public interest.

The DNC then brought a petition for review against the Federal Communications Commission and the United States in the United States Court of Appeals for the District of Columbia Circuit. (App. 421.) CBS (App. 428) and ABC (App. 426) intervened in the action. The case was consolidated with a petition for review of the Commission's decision in *Business Executives' Move for Vietnam Peace (BEM)* rendered the same day.[5]

The Court of Appeals, one judge dissenting, reversed the Commission decision. Relying especially on this Court's decision in *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969), the court held that an absolute and arbitrary ban on the purchase of time for discussion of public issues violated First Amendment principles embodied both in the Amendment itself and in the "fairness and public interest requirements" of the Communications Act of 1934. (App. 449, 455.) The Court of Appeals summarized its holding in these words:

> "The actual issue before us is relatively narrow and we decide it narrowly. . . . [W]e leave undis-

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[5] 25 F.C.C. 2d 242 (1970). BEM sought to purchase time from WTOP, a broadcast licensee serving the Washington, D.C. area, for messages concerning the Vietnam War, and was informed that "it is the policy of Post-Newsweek Stations radio and television stations not to sell spot announcement time to any individuals or groups in order to set forth a point of view on any controversial subject of public importance." App. 297. The BEM case was consolidated with the DNC's in the Commission's petition for certiorari in No. 71-864. The intervenors, CBS and ABC, filed petitions for certiorari in Nos. 71-863 and 71-866, respectively. In addition, Post-Newsweek Stations, Capital Area, Inc., intervened in the petition for review of the Commission's *BEM* order (App. 430), and filed the petition for certiorari in No. 71-865. The DNC is not a party in No. 71-865.

turbed the licensee's basic right to exercise judgment and control in public issue programming and the sale of advertising time. All we do is forbid an *extreme* form of control which totally excludes controversial public debate from broadcast advertising time.

We hold specifically that a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted. We do not hold, however, that the planned announcements of the petitioners—or, for that matter, of any other particular applicant for air time—must necessarily be accepted by broadcast licensees. Rather, we confine ourselves to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many 'editorial advertisements' will be put on the air." (App. 449; emphasis in original.)

It said that "the Commission's and intervenor's argument might be somewhat stronger if it were designed to support a partial ban on editorial advertising concerning issues and views which have *in fact* been substantially aired on normal programming time. The argument is unconvincing, however, in support of a flat, *per se* ban on any and all editorial advertisements." (App. 471; emphasis in original.)[6]

Citing this Court's decision in *Red Lion Broadcasting Co.* v. *FCC, supra,* the Court of Appeals

[6] The Court of Appeals in its opinion did not distinguish between short "spot" announcements and longer presentations, but held simply that when some time was sold, it could not be arbitrarily denied to purchasers who wished to discuss public issues. App. 449. The DNC had cited to the Commission CBS's refusal to sell one-half hour of prime time. App. 22.

noted the unique role of television and radio in American political debate, and stated that the First Amendment interests of the public included not just passively receiving information, but also hearing debate by proponents in a vigorous, "wide-open" format. (App. 466-468.) It noted this Court's recognition of the role of political advertisements in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), and held that discrimination against such advertisements in favor of commercial advertisements by broadcast licensees as administrators of a valuable public resource "intimately bound to government and to service of the commonwealth," would be impermissible. (App. 467, 474, 461, 464.) Paid political broadcasts, said the court, are "a special and separate mode of expression, not simply a duplication of other expression on the same medium." (App. 468-469.)

The Court of Appeals observed that even if an individual is selected to be interviewed on a news program, "he may expect his comments to be abbreviated and edited; reporters' commentary will qualify what he has to say." (App. 468.) Free debate is enhanced, said the court, when sometimes a speaker has some control of his presentation, and "it has traditionally been thought that the best judge of the importance of a particular viewpoint or issue is the individual or groups holding the viewpoint and wishing to communicate to others." (App. 469.) The flat ban proposed by the Commission and the networks, said the court, "conforms instead to a paternalistic structure in which licensees and bureaucrats decide what issues are 'important,' how 'fully' to cover them, and the format, time and style of coverage." *(Ibid.)*

The only issue before it, said the court, was "a total, flat ban on editorial advertising." It reiterated that "all that petitioners condemn here are regulations providing that public issue advertising may be aired 'at no time, in no place and in no manner' over the broadcast media." (App. 483.) The court specified that broadcast licensees were not common carriers, and that it was not holding that they must sell time to anyone for any message of public interest. (App. 482.) It noted that the Commission might appropriately limit the purchase of time in many ways, as for example

— the total amount of time sold for discussion of public issues;

— the placement of paid announcements;

— the amount of time sold to particular groups or viewpoints;

— the need to protect broadcast licensees from financial harm;

— the need to assure overall fairness. (App. 484-486.)

Citing past experience, the court rejected the claim that sale of some time for discussion of public issues might be administratively inconvenient. It pointed out that the Commission in *United Broadcasting Co.*, 10 F.C.C. 515 (1945), had adopted and followed such a policy without any difficulty. (App. 487-488.) It noted that "although many broadcasters already do allow editorial advertisements on the air, we have not been shown one reason, based on their experience, to suggest that chaos has resulted." (App. 484.) The court expressed confidence in the ability of the Commission to develop reasonable guidelines (App. 485-486), and di-

rected that it do so (App. 488). When those guidelines were developed, DNC would be permitted to reapply to purchase time and permitted to do so, unless its request did not comply with the guidelines of the Commission. *(Ibid.)*

Judge McGowan in dissent noted that the court had held only that the Commission should make reasonable regulations which would not totally ban purchase of time for discussion of public issues. He said he thought the Commission's task was not easy, but he agreed that "it may well be that a detailed inquiry and investigation by the Commission of this area, by formal rulemaking or otherwise, would be both useful and consonant with the Commission's continuing obligation to see to it that the public interest obligations of licensees are being met in the most effective way." (App. 491.) He disagreed with the court's conclusion that a flat ban on sale of time for discussion of public issues was invalid on constitutional grounds.

The Court of Appeals denied petitions for rehearing (App. 494) and for stay of mandate (App. 496, 498). This Court on January 24, 1972, likewise denied a stay of mandate. Thereupon the Commission by public notice solicited comments on fashioning guidelines which would regulate paid broadcasts on public issues but not ban it completely.[7] On February 28, 1972, this Court granted certiorari and also stayed the mandate of the Court of Appeals. The Commission then withdrew its previous notice.[8]

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[7] *Handling of Public Issues Under the Fairness Doctrine*, 33 F.C.C. 2d 554 (1972).

[8] *Handling of Public Issues Under the Fairness Doctrine*, 33 F.C.C. 2d 798 (1972).

SUMMARY OF ARGUMENT

The issue in this case is whether the public airwaves—the dominant communications medium in the United States—are to be used by those who sell soap, brassieres, deodorants, and mouthwashes, but not by those who espouse political ideas.

The Federal Communications Commission ruled that radio and television broadcast licensees, although they sell time for commercial advertising, have no obligation whatsoever to let a national political party purchase time at the going commercial rate to discuss public issues. A ban on purchasing time for political fundraising, the Commission held, would be "arbitrary" and impermissible; a ban on purchasing time for political speech was not. The Court of Appeals reversed the latter part of the ruling, on a narrow basis: it held that no one of course has an absolute or unrestricted right to purchase time on the public's broadcast channels, but that for the Commission to uphold a total and arbitrary ban on the sale of *any* time for discussion of public issues violated both the Communications Act of 1934 and the First Amendment. The Court of Appeals remanded to the Commission to develop rules with reasonable restrictions which would not absolutely ban purchase of time for discussion of public issues, and which would accommodate the interests of both the broadcast licensees and the public.

Rarely have litigants before this Court taken a more extreme position than the broadcast licensees in this case. Without any reference to the rules the Commission is to promulgate—for the Commission has not yet done so—the licensees argue that *no one* is *ever* entitled to purchase *any* time to discuss public issues. *Cf. Times Film Corp.* v. *City of Chicago,* 365 U.S. 43 (1961). Their broadside attack is inconsistent both

with the Communications Act, as previously interpreted by the Commission, and with the decisions of this Court construing the First Amendment.

I.

The Commission utterly rejected the very claim which the licensees now assert the first time it was made. In the landmark *United Broadcasting* decision, it held that "operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues" was "inconsistent with the concept of public interest established by the Communications Act." 10 F.C.C. 515, 518 (1945). *United Broadcasting* was followed in many subsequent informal actions and rulings. Thus there is nothing new or untried in the Court of Appeals' holding; and indeed it appears that some licensees currently do sell time for discussion of public issues.

This "public interest" holding is buttressed by § 326 of the Act, which the Commission has held includes an affirmative duty to promote a system of free expression. It most certainly is not altered by the fact that the Act provides differing regulatory frameworks for common carriers of personal point-to-point messages in Title II, and broadcasting in Title III. No one is arguing that a radio station is a telephone company, and the court's narrow denial of the licensees' asserted absolute power does not make them such. The "large public aims," *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 218 (1943), of the Communications Act clearly incorporate the First Amendment's mandate that debate of public issues is to be encouraged, and is to be "uninhibited, robust, and wide-open." See *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964). If licensees may totally ban everyone from purchasing time to talk about public issues, that debate is diminished.

II.

From Mr. Justice Holmes' dissent in *Abrams* v. *United States,* 250 U.S. 616, 630 in 1919 to this Court's holding in *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, three years ago, this Court has reiterated that the central purpose of the First Amendment was to create a marketplace of ideas, especially for political topics. *Red Lion* held that that goal applies with undiminshed force to the broadcast media.

The broadcast licensees seek something different. They plan, in the words of one of them, to "intervene" at all times *between* the public and those who would address it. Although conceding that the First Amendment includes a right of the public to be informed, the licensees say that they alone will inform it.

No three men—not even the chief executives of the three major networks—can be permitted such power if the First Amendment is to have meaning today. Radio and television are the dominant medium in the United States. If the right to speak in public streets and parks, whose primary function is not communication, may not be arbitrarily denied, surely no less is true for the public's airwaves, which serve no other purpose. *Cf. Grayned* v. *City of Rockford,* 40 U.S.L. WEEK 4881 (U.S. June 26, 1972). As applied to a national political party, such restrictions interfere with the right of political association at the national level, and with the political parties' function of translating inchoate discontent into peaceful and constructive governmental action. If totally barred from paying for access to the one medium which most Americans see, groups may turn away from debate to non-peaceful methods of change. At the least, they will be encouraged to engage in conduct so bizarre that television cameras will cover it as "news."

Petitioners seek a constitutional inversion. They would exalt commercial speech (which this Court has held enjoys lesser constitutional protection) over political speech (which is at the core of the First Amendment). Such discrimination is inconsistent with the equal protection guarantees of the Constitution, as well as with the First Amendment. *Police Dept.* v. *Mosley,* 40 U.S.L. WEEK 4877 (U.S. June 26, 1972); *Grayned* v. *City of Rockford, supra.* Moreover, the standard which the licensees propose to use in banning speech—"controversial issues"—is so broad in its sweep, as well as vague in its meaning, that it is itself unconstitutional. *Ibid.*

No other medium is involved here. Broadcasting, this Court has said, is unique." *Red Lion, supra,* 395 U.S. at 390. The medium has been pervasively regulated since its infancy—so pervasively regulated that the Commission itself has suggested that it may be required to apply the Constitution even to licensees' employment practices. Broadcast licensees use, free of charge, a scarce resource which not only belongs to the public, but was actually created by the Congress, for a single purpose: to serve the public interest in communication.

The licensees now argue (with no support from the Solicitor General or the Commission) that because the Commission has adopted a ruling permissive in form, it is not a ruling subject to First Amendment restrictions. But such agency actions are routinely reviewed by courts to assure that the agency has complied with the Constitution and laws. Moreover, the status of the First Amendment is special. Like the Fifteenth Amendment, it protects the lifeblood of the govern-

mental process. Where speech is concerned, this Court has held that a federal licensee, even one whose primary function is not communications, is subject directly to the First Amendment when that licensee's governmentally approved actions affect speech. *Public Utilities Comm'n* v. *Pollak,* 343 U.S. 649 (1944). And just as a private group may not ignore the Fifteenth Amendment if it takes over the only effective access to the electoral process, neither may the broadcast licensees constrict access to the marketplace of political ideas—particularly when their ability to do so stems entirely from a federal grant of power. *Cf. Terry* v. *Adams,* 345 U.S. 461 (1953); *Smith* v. *Allwright,* 321 U.S. 649 (1944). Even when other constitutional provisions are invoked, many cases have held that when government provides property and intimately regulates an activity for public ends, certain basic constitutional safeguards attach to the use to which that property is put. See, *e.g., Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961).

This is not to say, of course, that *every* action by a licensee is subject to *every* constitutional restriction. And of course the licensees have legitimate First Amendment interests of their own. But the First Amendment will not tolerate monopolization of the broadcast spectrum, "whether it be by the Government itself or a private licensee." *Red Lion, supra,* 395 U.S. at 390. And if time is paid for at the full commercial rate, how is the licensee harmed? There are some limits in restricting the public's speech beyond which the licensees may not constitutionally go. The absolute power they seek here exceeds those limits.

In familiar fashion, the licensees warn that insuperable administrative difficulties will follow if their

claim of arbitrary power is denied. Nothing of the sort is true. The Court of Appeals specifically required the Commission to formulate a rule which would not allow anyone to buy disproportionate amounts of time, which would give weight to the overall public interest, and which would also protect the economic and editorial interests of the licensees. Many reasonable accommodations of these interests are possible. In any event, the right of political speech is not to be abridged because of imagined difficulties or for administrative convenience, and "there will be time enough to reconsider" if such extravagant fears are realized. *Red Lion, supra,* 395 U.S. at 393. The fact that the broadcast licensees thrived for many years without the arbitrary power they now seek suggests that the end of American broadcasting is not at hand. Were this Court to endorse their claims, however, the end of television's full potential for political speech in an electronic age might well be.

ARGUMENT

I. AN ARBITRARY AND ABSOLUTE BAN ON PURCHASE BY A NATIONAL POLITICAL PARTY OF RADIO AND TELEVISION TIME IS INCONSISTENT WITH THE COMMUNICATIONS ACT OF 1934.

It is a precept of this Court too long settled for argument that constitutional decisions are to be avoided where statutes can reasonably be construed to avoid them, and that the enactments of Congress are to be construed so as to harmonize with the Constitution whenever possible. See, *e.g., Ashwander* v. *TVA,* 297 U. S. 288, 346-348 (1936) (Brandeis, J., concurring).[9]

[9] Among numerous examples are *Schneider* v. *Smith,* 390 U.S. 17 (1968); *International Ass'n of Machinists* v. *Street,* 367 U.S. 740 (1961); *Greene* v. *McElroy,* 360 U.S. 474 (1959); *Kent* v. *Dulles,* 357 U.S. 116 (1958).

The Court of Appeals found in the Communications Act an alternative basis for its holding.[10] The right of a national political party not to be totally and arbitrarily barred from purchasing broadcast time at full commercial rates for discussion of public issues is recognized in the Communications Act of 1934, and is consistent with the Act's purpose, legislative history, and prior interpretation.

A. An Arbitrary and Absolute Ban on Paid Announcements of a Political Party is Inconsistent with the Communications Act's Requirement that Broadcast Licensees Serve the Public Interest, and with the Commission's Long-Standing Interpretation of that Requirement.

Petitioners imply that invalidating an absolute ban on purchase of time for political discussion requires broadcast licensees to pursue a new and untried policy. Nothing could be farther from the truth. Removal of the absolute ban simply returns broadcasting to the long-standing practice under the "public interest" mandate of the statute, a practice which broadcast licensees found tolerable for many years, and which at least one major network apparently has followed up to now.[11]

The Communications Act in five separate provisions directs the Federal Communications Commission to regulate broadcasting in such a way as to promote "the

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[10] "Whether our decision is styled as a 'First Amendment decision' or as a decision interpreting the fairness and public interest requirements [of the Communications Act] 'in light of the First Amendment' matters little." App. 455.

[11] NBC stated that it had "no policy" preventing sale of time to the DNC (App. 47). It now asserts that its willingness to sell time was an act purely "in the exercise of its discretion." Brief for Amicus Curiae at 3.

public convenience, interest, or necessity.'"[12] Until very recently the consistent position of the Commission when the issue has been squarely presented has been that the statutory "public interest" requirement prohibits licensees from totally banning purchase of time to discuss political issues. The assertion that licensees might do so was forcefully rejected by the Commission the first time it was made, and numerous subsequent decisions have reiterated that a broadcaster as a servant of the public interest cannot absolutely refuse to sell any time for broadcasts on subjects of public importance.

From the earliest days of radio, both advertisements[13] and discussions on a wide variety of controversial public issues[14] were common. Broadcast time

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[12] See 47 U.S.C. §§ 307(a), 309(a) (standard for licensing); U.S.C. § 307(d) (standard for renewing or modifying licenses); U.S.C. § 303(b) (standard for prescribing nature of service); U.S.C. § 303(r) (standard for determining when rules shall be promulgated). The Commission has held that the duty under U.S.C. § 303(b) to "prescribe the nature of the service to be rendered" by licensees means that "the Commission can and must require the achievement" of a broadcasting system which makes 'great contribution . . . to an informed public opinion on vital public issues of the day." App. 257.

[13] The first paid announcement was broadcast by station WEAF New York in 1922. G. ARCHER, HISTORY OF RADIO TO 1926, 275-397-99 (1938). Advertising was looked upon as at best a necessary evil, and an early policy statement of the National Association of Broadcasters stated that "commercial announcements, the term is generally understood, should not be broadcast between 7 and 11 p.m." *Hearings on S. 6 Before the Senate Committee on Interstate Commerce*, 71st Cong., 2d Sess. (1930); see *id.* at 1705 (President of NBC).

H. HETTINGER, A DECADE OF RADIO ADVERTISING 300 (1933).

was purchased especially often for political discussions, most often to promote candidacies.[15]

Then in 1939 the National Association of Broadcasters, a trade association of broadcast licensees, adopted a new "Code" which for the first time asserted an across-the-board policy of refusing to sell time for discussion of controversial subjects—though even then the NAB did not venture to assert a right to ban political broadcasts.[16] The provision read:

> "Time for the presentation of controversial issues shall not be sold, except for political broadcasts."[17]

The first major test of this new policy came when CBS refused to sell time to the Co-operative League of the United States, saying the network's policy was "not to sell time for programs devoted to public controversial issues." When the League raised a protest, however, CBS decided to accept the broadcasts.[18]

Soon afterward the F.C.C. rendered its *United Broadcasting* decision,[19] described by one historian of radio as "a memorable order which, in effect, threw the door open to the sale of time for the discussion of public issues."[20] The case arose when a licensee refused

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[15] *Cf.* 67 CONG. REC. 5483 (1926) (remarks of Mr. Celler complaining of charge of $10 per minute).

[16] "Political broadcasts, as defined, are excepted because 'at certain times the contending parties want to use and are entitled to use more time than broadcasters could possibly afford to give away." BILL, A STATEMENT FROM THE NAB CODE COMPLIANCE COMMITTEE 2 n.1 (1939).

[17] See BROADCASTING, July 15, 1939, p. 9.

[18] L. WHITE, THE AMERICAN RADIO 77-82 (1947).

[19] *United Broadcasting Co.*, 10 F.C.C. 515 (1945).

[20] L. WHITE, *supra* n. 18, at 80.

to sell broadcast time to a labor organization, citing its policy against selling time for "programs which solicit memberships, discuss controversial subjects, race, religion, and politics." After the case was brought to the attention of the Commission the licensee reversed its policy. In approving a consent order, the Commission explicitly rejected the very same arbitrary policy which petitioners argue for here:

> "The Commission . . . is of the opinion that the operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues and that only charitable organizations and certain commercial interests may solicit memberships is inconsistent with the concept of public interest established by the Communications Act as the criterion of radio regulations . . ."[21]

Reaction to the decision was immediate.[22] In less than two months the NAB had amended its Code to delete the ban on sale of time for discussion of controversial issues.[23] Thereafter the Commission made sure, generally by informal means, that its clear policy was followed even by the recalcitrant:

> "[T]he F.C.C. fought valiantly for the right of legitimate minority groups to have time on other people's stations. As we have seen, the Commission took up the cudgels for the cooperative movement and organized labor in the early forties to

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[21] 10 F.C.C. at 518.

[22] *Broadcasting* magazine reported: "The FCC June 26 stated its flat opinion that radio time should be sold for the discussion of controversial public issues." Richards, *FCC Upsets NAB Code on Controversies*, BROADCASTING, July 2, 1945, p.15.

[23] See *NAB Revises Code, Expands Labor Relations*, BROADCASTING, Aug 13, 1945, p.20.

> amend its code to permit these groups to be heard. During 1945 and 1946, the F.C.C. gave sympathetic ear to complaints by the Steelworkers against WGY (Schenectady), by the United Electrical Workers against WICC and other Bridgeport stations, by the United Auto Workers against WGBV and other Indiana stations and against WBCM (Bay City, Michigan), and by the Cincinnati Industrial Council against WKRC (Cincinnati). Most of them were followed up and quietly settled 'out of court.' "[24]

Some cases went to formal ruling, however. In them the Commission made clear that the "public interest" mandate of the statute, while allowing reasonable discretion, not only prevented absolute refusals to sell time for political discussion, but also prevented total bans on sale of time for such public issues as abstinence, or such important topics as religion. In *Robert Harold Scott,* 11 F.C.C. 372 (1946), when a broadcast licensee

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[24] L. WHITE, *supra* n.18, at 175. The Solicitor General and Commission dismiss the *United Broadcasting* case as "dicta," apparently because the licensee rather than lose its license acquiesced in the policy which the Commission said was required. See Brief for the United States and the Federal Communications Commission at 47. The Brief for Post-Newsweek Stations, Capital Area, Inc. in No. 71-865, calls *United Broadcasting Co.* "an eccentric departure from an otherwise uniform line of Commission pronouncements." *Id.* at 37 n.36. Of the three recent Commission rulings the brief cites, *Democratic State Central Committee,* 19 F.C.C. 2d 833 (1968), involved free time under the fairness doctrine. *Mrs. Madalyn Murray,* 40 F.C.C. 647 (1965), was a request under the fairness doctrine for time at preferential rates to discuss religion. In any event, neither involved an asserted *total ban* on sale of time for controversial issues. The unreported letter to Washington Women's Strike for Peace, see App. 366, was again a complaint about failure to provide time to one particular group. The briefs for intervenors CBS and ABC do not refer to the *United Broadcasting, Albuquerque Broadcasting, Scott, Rainey, or Morris* cases (see *infra*) at all.

had refused to sell time at the going rate for a talk on religion, the Commission said the "public interest" requirements of the Act would not permit an absolute ban on sale for such discussion:

> "Freedom of speech can be as effectively denied by denying access to the public means of making expression effective — whether public streets, parks, meeting halls, or the radio—as by legal restraints or punishment of the speaker.
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> * * *
>
> "The criterion of the public interest in the field of broadcasting clearly precludes a policy of making radio wholly unavailable as a medium for the expression of any view which falls within the scope of the constitutional guarantee of free speech."[25]

See also *Homer P. Rainey,* 11 F.C.C. 898 (1947), in which the Commission, relying on *United Broadcasting Co., supra,* disapproved a licensee's policy of refusing to sell substantial amounts of time to political candidates:

> "Obviously, it would not be in the public interest for the licensee of any radio station . . . to arbitrarily deny or restrict the right of any person or group to discuss a public controversial issue . . . ." 11 F.C.C. at 903 (1947).

Cf. Sam Morris, 11 F.C.C. 197 (1946) (noting, on complaint that licensee had refused to sell time for "abstinence broadcasts," that beer and wine commercials raised an issue of public importance").[26]

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[25] 11 F.C.C. at 373, 376.

[26] When a licensee complained of administrative problems in selling time for paid broadcasts on controversial issues, the Commission reiterated:

> "[T]he possibility of the occurrence of such difficulties does not justify a station licensee in adopting a general rule that it

When in 1949 the Commission undertook a review of its policies in the "fairness" area, with particular emphasis on editorials by licensees, it reaffirmed its adherence to its earlier decisions, and said that "the inevitability that there must be some choosing between various claimants for access to a licensee's microphone, does not mean that the licensee is free to utilize his facilities as he sees fit or in his own particular interests as contrasted with the interests of the general public."[27] When the issue arose thereafter, the important role of purchased as well as of free time to discuss public issues was recognized.[28]

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will not make time available for the discussion of controversial subjects or for broadcasts by duly qualified candidates for public office. . . . Such refusal is inconsistent with the concepts of public interest established by the Communications Act as the criterion of radio regulation." *Albuquerque Broadcasting Co.*, 3 P. & F. RADIO REG. 1820, 1821 (1946).

[27] *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1248 (1949). There is no basis for the Commission's assertion, at p. 47 of its brief, that the *United Broadcasting Co.* decision was somehow without explanation swallowed up or overruled *sub silentio* by the 1949 Editioralizing report's reiteration of the general fairness doctrine and the licensee's duty to provide coverage of public issues. The 1949 report in this respect was a restatement, focused on licensee editorializing, of the principles in the Commission's famous "Blue Book," *Public Service Responsibilities of Broadcast Licensees* (1946), issued a few months after the *United Broadcasting Co.* decision. That 1946 issuance contained, like the 1949 reiteration, a statement that "the public interest clearly requires that an adequate amount of time be made available for the discussion of public issues." *Id.* at 40. There was no suggestion that requirement absolved licensees from the separate, but complementary, requirement in *United Broadcasting*, *Scott*, and other cases that time not be totally withheld from all those who wished *to purchase* it to discuss issues. The fact that *Scott*, *Morris*, and *Albuquerque Broadcasting* were decided after the Blue Book confirms this.

[28] See *City of Jacksonville*, 21 F.C.C. 334, 342 408 (1956); *cf. Loyola University*, 12 P. & F. RADIO REG. 1017, 1099 (1956).

So clear was the understanding that licensees could not totally ban speech on controversial issues that this "public interest" requirement was interpreted by the broadcast industry as overriding even the explicit reservation in § 315 of the Act that time need not be sold to candidates for public office.[29] The understanding was summarized by the President of the National Association of Radio and Television Broadcasters:

> "So now you must, as a matter of public interest—though there is not a statute that says you must take political advertising—the Commission has made it very clear that if you do not assume your public responsibility, competitively you may fail to get a license, or you may lose your license.
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> . . . It is not fully true that you can reject all political advertising and still perform your public-service duty.[30]

This Court likewise recognized the force of the "public interest" requirement in *Farmers Educational & Cooperative Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959), noting that "the Commission considers the carrying

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[29] *Cf. Red Lion, supra,* 395 U.S. at 382-83.

[30] *Hearings on Proposed Amendments to the Federal Corrupt Pracices Act and Hatch Political Activities Act Before the Senate Subcommittee on Privileges and Elections, Committee on Rules and Administration,* 82d Cong., 1st & 2d Sess. 176 (1951-2). Counsel for the broadcasters agreed. See Peterson, *Political Broadcasts,* 9 J. FED. COMM. BAR ASSN. 20, 21-22 (1948). *Accord, Hearings on Miscellaneous Bills to Amend the Communications Act of 1934, Before a Subcommittee of the House Committee on Interstate and Foreign Commerce,* 84th Cong., 2d Sess. 297-8 (1956). See also NATIONAL ASSOCIATION OF RADIO AND TELEVISION BROADCASTERS, THE TELEVISION CODE 4 (1952) which instead of a flat ban on sale of time for discussion of "Controversial Public Issues" stated that requests to discuss such issues "should be considered on their individual merits."

of political broadcasts a public service criterion to be considered both in license renewal proceedings, and in comparative contests for a radio or television construction permit.'"[31]

Thus a flat ban on sale of time for political discussion, or for other issues of public importance, has on many occasions been held a violation of the statutory requirement that broadcast licensees operate in the public interest. In following the precept that statutes are to be construed if possible to avoid constitutional questions, this Court has not hesitated to interpret broad and open-ended statutory mandates to that end. *Cf., e.g., Steele* v. *Louisville & N.R.R.*, 323 U.S 192 (1944) (duty to avoid racial discrimination inferred from duty of representation in Railway Labor

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[31] *Id.* at 534 (footnote omitted). The dissenting Justices in *WDAY* agreed that, 'The Federal Communications Commission has determined that to fulfill this congressional command ["public convenience, interest or necessity" in § 307] stations must carry some political broadcasts." 360 U.S. at 544 (dissenting opinion). *Accord, Obligation of Licensee To Carry Political Broadcasts*, 25 P. & F. RADIO REG. 1731, 1735 (1963). See also *John P. Crommelin*, 19 P. & F. RADIO REG. 1393 (1960), stating that the statute was not violated by a refusal to sell time to candidates for one public office because of lack of interest by the public, when time was sold to candidates for other offices.

In 1959, with this history before it, Congress amended § 315 of the Act to eliminate the equal-time rule for bona fide news broadcasts. The amendment was not intended to "diminish or affect in any way the Federal Communications Commission policy." S. REP. No. 562, 86th Cong., 1st Sess 13 (1959). See also H.R. REP. No. 1069, 86th Cong., 1st Sess. 5 (1959). The long-standing recognition that the public interest requirement superseded even the express language of § 315(a) respecting candidates was codified in the 1972 legislation which specifically stated that licensees may not adopt a policy of refusing to sell time to political candidates. See P.L. 92-225, 86 Stat. 3, § 103(a)(2) (1972).

Act); *Mitchell* v. *United States,* 313 U.S. 80 (1941) (racial segregation by railroad held to violate Interstate Commerce Act's prohibition of "undue or unreasonable prejudice or disadvantage"). The holdings of the Commission from the first decade of interpreting the "public interest" mandate of the Act are entitled to respect, particularly when this original reading of Congress' intent enhances the exercise of rights protected by the First Amendment. For the "public interest standard of the Act necessarily implies reference to the First Amendment's goals."[32] The Commission's attempt in the present case to overturn its previously established rule can only serve as an example of regulatory inconstancy which, when the right of free speech is thereby jeopardized, this Court cannot tolerate.[33]

B. The Communications Act Forbids Interference With the Right of Free Speech.

The Commission's previously established interpretation of the "public interest" requirement is buttressed by section 326 of the Communications Act, which forbids the Federal Communications Commission to "promulgate or fix" any "regulation or condition . . . which shall interfere with the right of free speech by means of radio communication."[34] The origins and history of § 326 show that it was a statutory commitment to a system of broadcasting consistent

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[32] *Red Lion, supra* 395 U.S. at 390. The broad objectives of the Act were recently reiterated in *United States* v. *Midwest Video Corp.,* 406 U.S. 649 (1972); see also *United States* v. *Southwestern Cable Co.,* 392 U.S. 157 (1968).

[33] *Cf.* Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards,* 75 HARV. L. REV. 863 (1962).

[34] 47 U.S.C. § 326.

with the First Amendment, one free from censorship of ideas because they are controversial.

The Communications Act of 1934 had its beginning in the Radio Act of 1927,[35] and with respect to radio broadcasting policy was "largely a rewriting" of the earlier law.[36] Secretary of Commerce Herbert Hoover, whose Department had attempted to regulate broadcasting before the Radio Act, had testified:

> "We can not allow any single person or group to place themselves in position where they can censor the material which shall be broadcasted to the public, nor do I believe that the Government should ever be placed in the position of censoring this material." [37]

His warning was in the minds of the members of Congress who wrote the Radio Act.[38]

The issue of broadcast licensees attempting to bar certain views from access to the air was raised by Representative Davis, who believed the House bill was not explicit enough on the subject:

> "A question was asked by the gentleman from New York [Mr. LaGuardia] about censorship, whether there was anything in this bill permitting Government censorship.

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[35] 44 Stat. 1162, ch. 169.

[36] *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940).

[37] *Hearings on H.R. 7357 Before the Committee on the Merchant Marine and Fisheries, House of Representatives*, 68th Cong., 2d Sess. 8 (1924).

[38] See, *e.g.*, 68 CONG. REC. 2571 (1927); 67 *id.* 5484 (1926).

> "The answer was no; and I am not in favor of that, but I am even more opposed to private censorship over what American citizens may broadcast to other American citizens. [Applause.]" [39]

However, the broadcasters had argued that they needed to protect themselves by screening statements in advance for possibly defamatory material for which they might be held liable, material not itself protected by the First Amendment.[40] Congressman Davis was reassured that such limited review was to be the only kind of private censorship permitted to broadcasters:

> "The only thing they do, as I understand it, is to see to it that nothing that is slanderous or seditious is put out over the radio .... [A]ll they did with any manuscript that came in was simply to edit it, and if it was such an article that could properly appear in a newspaper, they broadcast it, and if it was not an article that would be proper to put in a newspaper, they did not broadcast it .... [T]hey simply want to edit the manuscript to see it is not slanderous or seditious." [41]

With that understanding, Section 29 of the Radio Act was enacted.

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[39] 67 CONG. REC. 5484 (1926).

[40] *Cf. Sorensen* v. *Wood*, 123 Neb. 348, 243 N.W. 82 (1932), *appeal dismissed sub nom. KFAB Broadcasting Co.* v. *Sorensen*, 290 U.S. 599 (1933), discussed in *Farmers Educ. & Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525, 528 n.2 (1959).

[41] 67 CONG. REC. at 5491 (remarks of Mr. Free). Such appears to be in essence the sort of limited review applied by broadcast licensees to announcements today, if the announcements are commercial. See *Center for Law and Social Policy*, 23 P. & F. RADIO REG. 2d 187, 188 (1971), quoted in Brief for the United States and the Federal Communications Commission 51 n.44.

In 1934 when the Communications Act was passed the members of Congress again emphasized their intention to preserve the public's right of free speech. Representative Rayburn, manager in the House, reported that § 29 had been carried forward in § 326 of the new act.[42] When a Representative complained that a Senator had not been allowed to speak on the radio, he was assured that, while subject to the licensees' right to remove slanderous materials,

> "Section 29 is really the Magna Carta of the whole procedure and covers generally the complaints that have been made here today with regard to the freedom of the air."[43]

The Commission has also recognized that the free speech provision of § 326 expresses an *affirmative* policy that the people not be totally denied access to their airwaves whether by the Government, or by the Government's licensees:

> "Section 326 of the act provides that this control of the United States shall not result in any impairment of the right of free speech by means of such radio communications. It would be inconsistent with these express provisions of the act to assert that, while it is the purpose of the act to maintain the control of the United States over radio channels, but free from any regulation or condition which interferes with the right of free speech, nevertheless persons who are granted limited rights to be licensees of radio stations . . . may themselves make radio unavailable as a medium of free speech."[44]

In *Linn* v. *United Plant Guard Workers,* 383 U.S. 53 (1966), this Court held that the National Labor Rela-

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[42] 78 CONG REC. 10313, 10988 (1934).

[43] 78 CONG. REC. 1032 (1934) (remarks of Mr. McGugin); see also *id.* at 10329 (remarks of Mr. Culkin).

[44] *Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, 1248 (1949).

tions Act must be interpreted as incorporating the standards of the First Amendment. See 383 U.S. at 65. Such a construction is all the more appropriate where, as here, the Congress, in the basic federal statute dealing with communications, has explicitly referred to the Constitution by adopting constitutional language—"the right of free speech"—as the statutory standard.[45] And when the question is one not of telephone rates or channel interferences, but rather of free speech, no administrative body has more expertise than this Court.[46]

C. Congress Had No Intention, in Excluding Broadcast Licensees from the Traditional Category of Common Carriers for Hire, To Exempt the System of Broadcasting Regulation from Public Interest and Free Speech Requirements.

Petitioners argue that public interest and free speech considerations are irrelevant because Congress in the definitional section of the Communications Act did not classify broadcast licensees as "common carriers." See 47 U.S.C. § 153(h). But the DNC is not arguing, and the court below specifically did not hold, that licensees are "common carriers."[47] To refrain from totally refusing to sell *any* time for discussion of public issues does not make one a "common carrier." And when that phrase is placed in the context of the Communications Act as drafted, it is seen that Congress did not regard it as detracting from the statutorily imposed responsibilities of broadcast licensees.

The phrase "common carrier" appears in the Interstate Commerce Act,[48] which as amended prior to 1927 vested in the Interstate Commerce Commission juris-

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[45] See 67 CONG. REC. 5480 (1226) (remarks of Mr. White); *Red Lion, supra*, 395 U.S. at 389-90.

[46] *See New York Times Co*, v. *Sullivan, supra*, 376 U.S. at 285; *Pennekamp* v. *Florida*, 328 U.S. 331, 335 (1946).

[47] See App. 482.

[48] 49 U.S.C. § 1 *et seq.*

diction to regulate the charges of companies engaged in wire or radio communication. The phrase was included in early drafts of the bill which became the Radio Act of 1927 for at least two reasons. First, some Senators apparently were under the impression that the commerce power of Congress extended only to regulation of common carriers, or that the phrase common carrier signified operation in interstate commerce.[49] Secondly, the term recognized the intention of some that certain aspects of radio broadcasting should remain subject to the jurisdiction of the Interstate Commerce Commission even after licensing responsibilities were assigned to the Federal Radio Commission.[50]

However, drawbacks to the "common carrier" language as theretofore applied to railroads, telephones, and telegraph companies became apparent. Clearly the doctrines associated with transportation companies or those engaged in point-to-point transmission of messages would not perfectly fit licensees whose principal function was to disseminate broadcasts of entertainment and information. It was also feared that use of the phrase "common carrier" might turn all or nearly all the broadcast day over to commercial advertisers or senders of personal messages, making scheduled programs impossible and leaving little or nothing for the public.[51]

> "If they are made common carriers, one wishing to advertise goods, automobiles or any other commodity, would have to be served, and the radio

[49] See 67 CONG. REC. 12502 (1926) (remarks of Senator Watson).

[50] See 68 CONG. REC. 2580 (1927) (remarks of Mr. White); see also *id.* 3032 (remarks of Senator Dill).

[51] See 67 CONG REC. 12356 (1926) (remarks of Senator Fess).

> would be deprived of the incentive which it now has of getting a certain program which the broadcasting stations must prepare in advance, in order to give a regulate entertainment at regular hours, to comply with the hours in which their licenses specify they may entertain." [52]

Senator Dill agreed that even with respect to discussion of "public questions" a common carrier provision would be unwise, since "they would have to give *all* their time to that kind of discussion." [53] The concern was over *total* loss of control over program schedules—not over the recognized public interest responsibility to provide *some* time for discussion of public issues, and certainly not over any time already set aside for advertising. It was such concerns that led to the 1934 Act's differentiating the telephone and telegraph companies regulated under Title II of the Act from the different system of regulation established under Title III for commercial broadcasting.[54]

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[52] 67 CONG. REC. 12504 (1926) (remarks of Senator Broussard).

[53] *Ibid.* (emphasis supplied).

[54] The draftsmen of the Communications Act would have been surprised at the assertion that by not making broadcasters "common carriers" forced to accept all commercial advertisements, they were thereby enacting a regime which barred the airwaves to paid discussion of public issues and left them entirely to commercial product advertisements. Congressman Fess stated:

> "I am disgusted, as I know a great portion of our people are disgusted, with the pollution of the air for mere commercial purposes." 78 CONG. REC. 8832 (1934).

Congressman White added:

> "I have long been a believer, and I believe now, that commercial activities occupy too much of the time and use too many of the radio facilities of this country." *Id.* at 8845.

In short, what Congress said is that a broadcast licensee is not a telephone company. It is not to be regulated "in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission." *FCC* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 474 (1940). The concern of Congress in eliminating the term "common carrier" was not to undermine the clearly expressed statutory duty of broadcast licensees to serve the public interest. It was not to give licensees the right to engage in arbitrary conduct. It was simply to prevent total control by advertisers and avoid importing to a new medium terminology which did not suit the intended method by which it was to serve the public. As the late Professor Chafee noted:

> "The context plainly shows this [§ 153(h)] to mean a 'common carrier for hire,' like a telegraph company. It has no reference to what we are now talking about—the obligation to present all sides fairly."[55]

II. THE COMMISSION'S APPROVAL OF AN ARBITRARY AND ABSOLUTE BAN ON PURCHASE BY A NATIONAL POLITICAL PARTY OF RADIO AND TELEVISION TIME TO DISCUSS PUBLIC ISSUES VIOLATES THE FIRST AND FIFTH AMENDMENTS.

In its present posture, the only issue in this case is the Commission's ruling that a total and absolute ban on political parties' buying time at full commercial rates to discuss political matters is consistent with the Communications Act and the First Amendment. The Court of Appeals held that an absolute ban could not stand, and directed the Commission to fashion rules granting some right of some persons to purchase some time in some circumstances. It left the Commission

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[55] 2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 635 n.75 (1947).

and licensees "broad latitude to develop 'reasonable regulations' " with "room for broad exercise of the broadcasters' discretion." [56]

The petitioners challenge that direction. They make an extreme "broadside attack" on any right of a party to purchase any time. The standards for purchase which might be applied are "not challenged and not before us." *Cf. Times Film Corp.* v. *City of Chicago,* 365 U.S. 43, 50 (1961). Petitioners frame their claim in sweeping and absolute terms.[57] By doing so, they leave this Court little latitude. To the absolute arbitrary power for which the licensees contend, the answer clearly must be, no. *Cf. Times Film, supra.*

A. An Arbitrary and Absolute Ban on Use by a Political Party of the Twentieth Century's Most Effective Public Forum Cannot Stand If Debate on Public Issues Is To Be "Uninhibited, Robust, and Wide-open."

In *Abrams* v. *United States,* 250 U.S. 616 (1919), Mr. Justice Holmes in dissent sounded what has become a dominant theme in applying the First Amendment to the changing problems of the Nation that come before this Court. "[T]he ultimate good desired," he said, "is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get

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[56] App. 484.

[57] The Court below stated that

> "The Commission's and intervenors' argument might be somewhat stronger if it were designed to support a partial ban on editorial advertising concerning issues and views which have *in fact* been substantially aired on normal programming time. The argument is unconvincing, however, in support of a flat, *per se* ban on any and all editorial advertisements." App. 471, 482 (emphasis in original; footnote omitted.)

itself accepted in the competition of the market." 250 U.S. at 630.[58] In *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), this Court spoke of this Nation's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," and in *Pickering* v. *Board of Education*, 391 U.S. 563, 573 (1968), referred to this as "the core value of the Free Speech Clause of the First Amendment."[59] With respect to radio and television broadcasting in particular, this Court has held that "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to contenance monopolization of that market, whether it be by the Government itself or a private licensee." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969).[60]

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[58] Similarly, Judge Learned Hand noted the Nation's vital interest in

> "the dissemination of news from many different sources with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."

United States v. *Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945). See also Radcliffe, *Censors*, SELECTED ESSAYS ON CONSTITUTIONAL LAW 1938-1962, 685, 697 (Barrett et al. ed. 1963); "We must stake our future upon fecundity of ideas."

[59] *Cf. Whitney* v. *California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

[60] See also, *e.g.*, *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966); *Thornhill* v. *Alabama* 310 U.S. 88, 102 (1940); see generally Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REVIEW 191.

Yet the Commission in this case argues for a different scheme. Under it, broadcast licensees alone are to determine what public issues the public should be exposed to, and how discussion should be structured. As CBS benignly puts it, there must be "intervention of professional journalists between the event and the public." [61] The situation was described with less euphemism by Lord Radcliffe, a gentleman not lacking in experience with censorship and the media, who listed "the controllers of radio and television" among "the real licensors of thought today":

> "We create great systems for the production and dissemination of ideas and concentrate in the control of them a power that by inertia can easily defeat the very liberties that are in form beyond attack. It is in this power that there lies a modern and effective censorship; it intervenes between the public and those who would communicate with it, and by its tone, by its assessment of comparative values, and by its courage or its fearfulness about men and affairs it can profoundly influence ideas and aspirations." [62]

The networks' paternalistic scheme for organizing public discussion overlooks two vital aspects of the First Amendment's rather different plan for discussion of public issues: First, that a rule is not to be tolerated which "dampens the vigor and limits the variety of public debate," *New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 279, and that even if one-sided, "utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth," *Garrison* v. *Louisiana,* 379 U.S. 64, 73 (1964). Secondly, that where the public's resources—streets, parks, or airwaves—are

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[61] App. 57.

[62] Radcliffe, *supra* n. 58, at 685, 686, 698.

used for discussion, they may not be arbitrarily and totally denied to responsible speakers by those who administer the resource.

1. The Public's First Amendment Right To Be Informed Includes the Right of Direct Communication With the Proponents of Ideas.

In *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969), this Court unanimously, over the networks' strenuous objections to the Commission's fairness doctrine, reiterated that the First Amendment protects "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences." "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." 395 U.S. at 390.

There was nothing new or remarkable in this holding that the First Amendment, besides including the right to distribute information, "necessarily protects the right to receive it." *Martin* v. *City of Struthers,* 319 U.S. 141, 143 (1943). This Court has protected the public's First Amendment right to be informed on many occasions, in a variety of contexts.[63] The Commission and its licensees all appear to concede the point.

Yet the broadcast licensees seek to vitiate their concession by arguing here, as they did unsuccessfully in *Red Lion,* that they can do a better job of presenting ideas than can the proponents of those views, and can by their "intervention" between speaker and listener achieve more "objectivity and fairness" (App. 51). The short answer to that condescending attitude was

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[63] See, *e.g., Stanley* v. *Georgia,* 394 U.S. 556, 567 (1969); *Time, Inc.* v. *Hill,* 385 U.S. 374, 388 (1967); *Griswold* v. *Connecticut,* 381 U.S. 479, 482 (1965); *Lamont* v. *Postmaster General,* 381 U.S. 301, 307 (1965); *id.* at 308 (Brennan, J., concurring).

provided by this Court in *Red Lion*, quoting John Stuart Mill:

> "Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them." [64]

If a public park were often used for meetings, it would seem bizarre to reject citizens' requests to schedule a peaceful speech on it by saying, "No, you may not give your speeches, but instead someone else may give them for you." Nor would it help to add, "Perhaps some of you may, if we choose, be allowed to say a few words, under conditions that we choose." That does not have the ring of the First Amendment. Yet that is where the licensees' logic ultimately leads.

The licensees make the facile assertion that if anything is worth saying to the American people, the licensees see that it gets said, and as fully as it deserves, on the air.[65] One wonders that human beings are capable

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[64] 395 U.S. at 392 n.18, quoting J. MILL, ON LIBERTY 32 (R. McCallum ed. 1947). The same assumptions, of course, underlie the adversary procedures of the Anglo-American judicial system. See, *e.g.*, E. CHEATHAM, A LAWYER WHEN NEEDED 4-5 (1963).

[65] The networks' assertions seem to vacillate as to whether they claim total discretion only to select all spokesmen and formats, or to decide which issues the public shall hear as well. *Cf.* NBC's reference to the "right to determine in the first instance which issues and which points of view should be broadcast." Brief of Amicus Curiae at 15. The confusion is not surprising; obviously such a line is almost impossible to draw.

of such omniscience and industry.[66] But in fact, although the licensees' obligation to serve the public interest requires them to give some coverage of public issues,[67] few observers are under any illusions that this rather vague requirement alone guarantees "robust" debate:

> "[T]here is considerable possibility that the broadcaster will exercise a large amount of self-censorship and try to avoid as much controversy as he safely can . . . . It seems doubtful . . . that except in cases of glaring failure to discuss paramount issues, the Commission could detect editorial cau-

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[66] CBS in order "to demonstrate how fully and fairly issues are reported to the public by CBS News" attached a minute-and-second compendium of its principal evening news program's coverage of two major issues, the Indochina War and domestic reaction and protest, for March, April, and May, 1970. See App. 53. These figures show that during that period of intense war-related activity, CBS devoted to overall coverage of the war, Congressional and official reaction, and domestic protest, diplomatic negotiations, and the My Lai massacre, a combined total of 3 minutes and 55 seconds each evening in March 1970, and 4 minutes and 59 seconds in April 1970. (App. 82-108). In May, the month that saw the Cambodian incursion, the Kent State tragedy, and widespread campus riots, the combined average rose to 8 minutes and 6 seconds, the longest single item being a 10½ minute reply by CBS to charges that it had falsified a story. (App. 109-128, 123.) In addition, CBS stated that commentator Eric Sevareid gave views averaging about 2½ minutes in length on matters in some way related to Indochina on 16 of the 92 days in question, once "on two foreign crisis areas . . . with emphasis on Trinidad." (App. 129-30.) CBS in the same period broadcast two Presidential addresses, to which it appended 11:16 and 18:24 minutes respectively of analysis by CBS reporters (App. 131, 133-136), and three news specials, two of them on college riots (App. 139-149); Mike Wallace interviewed Walter Hickel (20:30), John Mitchell (1:00), and Seymour Hersh (12:18) (App. 160); and guests on "Face the Nation" over the fourteen-Sunday period addressed all these subjects for an average of 10 minutes and 10 seconds per broadcast (App. 165-169).

[67] See *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598 (1964).

> tion. The rather unrealistic assumption that the Commission can deal successfully with editorial caution is . . . evidence of wishful thinking." [68]

Nor is it simply a question of giving adequate coverage to what is newsworthy. At stake is the ability to bring new or unperceived issues to the attention of the American people, without having to resort to sit-ins, street demonstrations, or other disruptive or violent activities which may be more likely to draw television coverage.

This Court has recognized the importance in our communications system of editorial advertisements, calling them "an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of the press even though they are not members of the press." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266 (1964). And as the court below recognized:

> "'Viewpoints' cannot be so neatly and infallibly catalogued as the Commission would have us believe. Self-expression and public debate are much more subtle phenomena; matters of style and intensity of feeling are important components." [69]

Accord, Lee v. *Board of Regents*, 306 F. Supp. 1097, 1101 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971); *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969).

There is also the simple matter of accuracy. Even if one could accept the paternalistic theory of the net-

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[68] Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 773-4 n.26 (1972).

[69] App. 472 (footnote omitted).

works, experience has shown time and again that they are not always dependable parents, and that it is safer for people who believe ideas to express them in their own way than to rely on the "intervention . . . of professional journalists." For example, in *Complaint Concerning the CBS Program "The Selling of the Pentagon,"* 30 F.C.C.2d 150 (1970), whatever one's opinions on the underlying subject matter, the Commission unanimously found that the licensees had shown views which might have appeared decidedly differently without their "intervention":[70]

> "As far as the viewer could tell—and neither Colonel MacNeil nor CBS made it clear—the

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[70] "This is what the viewers of the CBS documentary were shown as a single exchange:

> ROGER MUDD: What about your public displays of military equipment at state fairs and shopping centers? What purpose does that serve?
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> MR. HENKIN: Well, I think it serves the purpose of informing the public about their armed forces. I believe the American public has the right to request information about the armed forces, to have speakers come before them, to ask questions, and to understand the need for our armed forces, why we ask for the funds that we do ask for, how we spend these funds, what we are doing about such problems as drugs—and we do have a drug problem in the armed forces, what we are doing about the racial problem—and we do have a racial problem. I think the public has a valid right to ask us these questions.

"This, on the other hand, is how Mr. Henkin actually answered the question cited above:

> MR. HENKIN: Well, I think it serves the purpose of informing the public about their armed forces. [*This is the only sentence that was retained intact in the answer as broadcast.*] It also has the ancillary benefit, I would hope, of stimulating interest in recruiting as we move or try to move to zero draft calls and increased reliance on volunteers for our armed forces. I think it is very important that the American youth have an opportunity to learn

speaker seemed to be affirming the 'domino theory' as applied to Southeast Asian nations under Communist pressure, although as the printed transcript shows he was in fact quoting the Prime Minister of Laos to this effect." 30 F.C.C.2d at 151.

"The other aspect of principal controversy concerns an interview between Mr. Henkin [Assistant Secretary of Defense] and Mr. Mudd [CBS reporter]. In it, some portions of Mr. Henkin's

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about the armed forces. [*Both the latter sentences were dropped entirely.*]

"The answer Mr. Henkin was shown to be giving had in fact been transposed from his answer to another and later question that dealt not only with military displays but also with the availability of military speakers. At that later point in the interview, Mr. Mudd asked Mr. Henkin whether such things as drug and racial problems constituted 'the sort of information that gets passed out at state fairs by sergeants who are standing next to rockets.'

"Mr. Henkin replied as follows:

MR. HENKIN: No, I didn't—wouldn't limit that to sergeants standing next to any kind of exhibits. I knew—I thought we were discussing speeches and all.

"But this is how the sequence was shown over the air:

MR. MUDD: Well, is that the sort of information about the drug problem you have and the racial problem you have and the budget problems you have—is that the sort of information that gets passed out at state fairs by sergeants who are standing next to rockets?

MR. HENKIN: No. I wouldn't limit that to sergeants standing next to any kind of exhibits. Now, there are those who contend that this is propaganda. I do not agree with this.

"The second sentence of Mr. Henkin's actual answer—the part about 'speeches and all'—had been omitted. And the 'new' material—about propaganda—came from an earlier point in the interview and was in fact a reference to charges that the Pentagon was using talk of an 'increasing Soviet threat' as propaganda to influence the size of the military budget."

30 F.C.C. at 151-52 (inserted comments and emphasis in original) (footnote omitted).

> answers were cut; and what appeared as answers to particular questions were in fact rearranged from answers to quite different questions. *Ibid.*'"[71]

The Commission, respecting the "journalistic functions" of "selection and editorial judgment" has refused "to lay down some precise line of factual accuracy." *Complaint Concerning the CBS Program "The Selling of the Pentagon," supra,* 30 F.C.C.2d at 152. The deference of the Commission to the licensees in this respect reflects the First Amendment's policy against censoring the statements and opinions which reach the public. But there is a complementary aspect of that policy: it assumes that error will be caught and corrected because there is to be a multitude of voices, "a marketplace of ideas in which the truth will ultimately prevail." *Red Lion, supra,* 395 U.S. at 390. Remission of the public to the marketplace of ideas necessarily presupposes that the market exists. There cannot be "monopolization of that market, whether it be by the Government itself or a private licensee." *Red Lion, supra,* 395 U.S. at 390. The very need to avoid governmental censorship of program content implies that other sources of information shall have some opportunity, at their own expense, to speak directly to the public on important matters as they see them.

The good faith of the broadcast licensees and their employees is not the question. The DNC does not challenge it. No doubt CBS, ABC, and NBC sincerely be-

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[71] See also *Complaints Covering CBS Program "Hunger in America,"* 20 F.C.C. 2d 143, 147 (1969) ("CBS nevertheless engaged in sloppy journalism or was recklessly indifferent to the truth in not ascertaining the cause of death of the Wright baby" —infant shown as dying of malnutrition who actually died of complications from prematurity); *Complaints Concerning Network Coverage of the Democratic National Convention,* 16 F.C.C. 2d 650 (1969).

lieve that they are the best judges of what the public should see and hear every minute of every day. What the DNC contends is that the unparalleled power for which the networks argue cannot safely be lodged with anyone:

> "[T]he prospect is the somewhat menacing one that the way will simply be barred to the adventurous and the heterodox. It will not be barred by censorship as historically understood, it will not be barred by law: if it is barred it will be barred by a general average opinion imputed to the public, very likely quite erroneously, by a number of respectable gentlemen who will neither know nor want to know better." [72]

Functionally, in a limited medium, censorship is censorship, whether administered by government or by a few licensees.

Apparently recognizing that a constitutional compulsion for permitting discussion exists, the broadcast licensees now argue that the fairness doctrine (which they previously said was unnecessary and unconstitutional) is the whole answer. It is not and never been thought to be.[73] It is not enough to rely on the broadcast licensees as Platonic Guardians to decide for every

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[72] Radcliffe, *supra* note 58, at 697.

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> "Both the Supreme Court, this court, and the Commission itself have all recognized that the fairness doctrine is not an island whole unto itself. It is merely one aspect of the Commission's implementation of the requirement that broadcasting stations serve the public 'interest, convenience, and necessity' . . . [T]he Commission has upon occasion recognized that time, rather than information, is of the essence."

Retail Store Employees Union, Local 880 v. *FCC*, 436 F.2d 248, 257 (D.C. Cir. 1970) (directing F.C.C. to hold hearing before renewing license of broadcaster which had refused to sell time to union).

minute what issues shall reach the public, who shall present them, and how they shall be shown.[74] If "supervised and ordained discussion" is less than the First Amendment intends for schoolchildren, *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503, 513 (1969), then surely it also is less than is required for the viewing and listening public.

2. The First Amendment Forbids an Arbitrary and Total Barring of Paid Political Broadcasts from a Forum Which Belongs to the Public, Is Dedicated Purely To Communication, and Is Probably the Most Effective Medium for Influencing Public Opinion.

Approximately 95% of American homes—nearly 60 million households—contain at least one television set, and that set is turned on for an average of more than five and one-half hours each day. The average adult American spends more time watching television than in any activity except sleeping and working, and looks to it and radio as his major source of most news.[75] As a House report noted:

> ". . . the [television] medium—for whatever reason—has become the public's prime source of in-

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[74] Even if the licensees were competent to perform this task, doubts as to their performance would always be present, doubts which do not enhance public confidence and national stability. *Cf. Columbia Broadcasting System, Inc.*, 17 P. & F. RADIO REG. 2d 843 (1969) (insufficient evidence of staging of news events); for one author's view, see E. EFRON, THE NEWS TWISTERS (1971).

[75] *Hearings on H.R. 13721 Before the Subcommittee on Communications and Power, Committee on Interstate and Foreign Commerce, House of Representatives*, 91st Cong., 2d Sess., p.7 (1970) (statement of Dean Burch, Chairman, Federal Communications Commission). Recent surveys concluded that 67% of the populace prefers the electronic media to other sources of information. Roper Research Survey, quoted in G. WYCKOFF, THE IMAGE CANDIDATES 13-14 (1968). An estimated 59% depend on television as their principal source of news. See *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules*, 22 F.C.C.2d 339, 344 (1970).

> formation. It is this fact which determines its influence. In advancing to the stage of importance, broadcasting has in many ways supplanted the other media of mass communication." [76]

In the United States in the final third of the Twentieth Century, television is the political forum *par excellence.*

There is considerable evidence that the electorate is deeply influenced by telecasts on public issues. For example, many commentators have concluded that the televised debates between the 1960 Presidential candidates of the two major political parties—witnessed by more than 115 million Americans—were the decisive factor in that election.[77] According to the Harris poll, prior to President Nixon's television address on April 30, 1970, concerning the crossing into Cambodia, only 7% of the nation approved such action; following his address, more than 50% approved. Before President Johnson's speech on the Gulf of Tonkin incident, less than half of the electorate approved of his Vietnam

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[76] H.R. REP. No. 91-257, 91st Cong., 1st Sess. 6 (1969). ABC agrees as to:

> "the critical role the broadcast media play in keeping contemporary American society adequately informed on important public issues. That broadcasting in general and electronic journalism in particular have become major sources of information to the American public is, therefore, an undeniable threshold premise."

Brief for Petitioner American Broadcasting Companies, Inc. at 18.

See generally J. KLAPPER, THE EFFECTS OF MASS COMMUNICATION (1960).

[77] See, *e.g.*, T. WHITE, THE MAKING OF THE PRESIDENT 1960, 352-53 (1961); K. LANG & G. LANG, POLITICS AND TELEVISION 213 (1968).

policy; after the speech, more than 70% of the public endorsed his program.[78] Those whose own interests are at stake believe television and radio are important, and they act accordingly.[79] Courts have recognized "the infinite potential of television to influence American life."[80]

The broadcasting spectrum is a public resource, publicly developed. Where a publicly owned resource is a reasonably appropriate forum for communications, a total ban on use of that resource for communication of ideas violates the First Amendment. *See, e.g., Grayned* v. *City of Rockford*, 40 U.S.L. WEEK 4881, 4884 (U.S. June 26, 1972), quoting *Hague* v. *CIO*, 307 U.S. 496, 515 (1939) (opinion announcing judgment).[81] In a case involving public property used primarily for

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[78] L. Harris, *President's Using TV Helps*, CHICAGO TRIBUNE, Sept. 3, 1970.

[79] *Cf., e.g.*, J. MCGINNIS, THE SELLING OF THE PRESIDENT 1968 (1969). The United States Government, indeed, believed television and radio so effective that it spent $10.6 million for broadcasting U.S. Army recruiting advertising in one thirteen-week period in 1971. See *Army Enlists Ayer for Ad Blitz*, BROADCASTING, Feb. 22, 1971, p. 38. The Senate has added a rider to the FY 1973 Department of Defense Procurement Authorization bill specifically authorizing purchase of radio and television time. See 118 CONG. REC. S11605 (daily ed. July 24, 1972).

[80] *Office of Communication of United Church of Christ* v. *FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969) (Burger, J.). "[T]echnology has immeasurably increased the powers of the press to do both good and evil . . . [The task is one of] implementing the First Amendment by assuring the effective communication which is essential to the continued functioning of our free society." *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 60 (1971) (opinion of White, J.).

[81] See also *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 152 (1969); *Kunz* v. *New York*, 340 U.S. 290, 293 (1951); *Cf.* L. MUMFORD, THE CITY IN HISTORY 148-150 (1961) (Athenian agora);

purposes other than communication—streets, parks, and sidewalks—the task is to weigh the interest of citizens in using it for that purpose under reasonable regulation, against possible interference with the property's principal use. *Compare Cox* v. *Louisiana,* 379 U.S. 536 (1965), *and Cox* v. *Louisiana,* 375 U.S. 559 (1965), *and Brown* v. *Louisiana,* 383 U.S. 131 (1966), *with Adderley* v. *Florida,* 385 U.S. 39 (1966.[82] In the present case, such a conflict does not exist. For unlike a street, used principally for travel, or a park, used principally for recreation, the standard broadcast frequencies are public domain used principally for communication with the public—indeed, by decision of Congress they have no other use.

Even where the property involved is not public, in certain circumstances the interest in communication on public issues may override the ordinary property rights of the owner, when no suitable alternative method of communication is available. As one writer put it, in some cases there may be "a First Amendment easement."[83]

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id. at 221-227 (Roman forum). Although it was once said that municipal property could be used for communication only at the sufferance of the state, *Davis* v. *Massachusetts,* 167 U.S. 43, 48 (1897), on reconsidering the requirements of the First Amendment that notion that speakers could be absolutely banned from public property suited for speaking was "directly rejected by this Court," *Jamison* v. *Texas,* 318 U.S. 413, 418 (1943).

[82] See also *Niemotko* v. *Maryland,* 340 U.S. 268, 276 (1951). The Court of Appeals recognized the need to resolve competing interests when it said that the right not to be totally barred from purchase of time on the public airwaves was "abridgeable"—*i.e.*, that it was not absolute, and was subject to reasonable regulation. See App. 467.

[83] Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana,* 1965 SUP. CT. REVIEW 1, 13. See, *e.g.*, *Marsh* v. *Alabama,* 326 U.S. 501 (1946); *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308 (1968).

Lloyd Corp. v. *Tanner,* 40 U.S.L. WEEK 4829 (U.S. June 22, 1972), shows that even if the airwaves were privately owned, a reasonable right of access for speech would be required. In *Lloyd* a group sought free use of a privately owned shopping center to distribute handbills on a subject unrelated to the property's use. A lower court ordered the shopping center owner to allow "*all* non-commercial handbilling which *anyone* desires to undertake within its private premises." [84] This Court listed as relevant whether such a use would have any "relation to any purpose for which [the privately owned property] . . . was built and being used; whether the property owner was performing functions "as a delegate of the State;" whether there were "adequate alternative avenues of communication;" and whether the constitutional provisions against taking of property without due process of law or without just compensation could be adequately accommodated.[85] This Court in *Lloyd* found that the function of the property was sales, that adequate alternative places of communication existed, and that the asserted right was inconsistent with the private property's legitimate function. Clearly, by that analysis, communication is to be permitted where, unlike *Lloyd,* no right to use it in *all* situations is asserted, and where the property is the public's; it is administered by the Government's licensee; it has no function other than communication; the DNC is willing to pay; and no private property rights are compromised.

This Court in *Lloyd* reiterated that

> "it has often been held that publicly owned streets, sidewalks and parks are so historically associated

[84] 40 U.S.L. WEEK at 4833 n.11 (emphasis supplied).

[85] *Id.* at 4833, 4835, 4834.

> with the exercise of First Amendment rights that access to them for purposes of exercising such rights cannot be denied absolutely." [86]

No park, street or sidewalk is more important to communication in 1972 than the two or three network television channels in each of our major cities, or the radio stations which speak to the commuter. In no park, street or sidewalk is the public's Congressionally recognized interest in communication greater. For the public's airwaves or a city's streets, "access to them for purposes of exercising such rights cannot be denied absolutely." *Lloyd Corp.* v. *Tanner, supra.*

3. The Unique Characteristics of Publicly-Licensed Broadcasting Imply Corresponding Unique Obligations.

This case does not involve any medium other than the licensed broadcast frequencies. Broadcasting has long been recognized as unique, with characteristics which set it apart from newspapers, magazines, billboards, handbills, and all the other communications media. As Professor Chafee put it, "the [First] Amendment necessarily works out differently for radio simply because radio *is* different." [87]

—Broadcasting is conducted by using a scarce public resource.[88] And unlike other public property, the

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[86] *Id.* at 4832.

[87] 2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 638 (1947) (emphasis in original).

[88] See 47 U.S.C. § 301. Although some who advocate more security for licensees from renewal challenges seek to dismiss the public's dominion of the airwaves as an "irrelevance," see Jaffe, *We Need the Pastore Bill,* NEW REPUBLIC, Dec. 6, 1969, p. 15, there remains an inescapable public concern for the use of the broadcast frequencies which does not, and indeed should not, obtain in a medium which was not public in its beginning and continued existence.

broadcast channels are not simply owned. They were actually created by federal action, out of chaos and "cacaphony." *Red Lion, supra,* 395 U.S. at 376. They are not public property incidentally rented out. Their use unavoidably involves their entire reason for being: to serve public interest in communication:[89]

—Licensees enjoy what one sympathetic observer called "a spectacular subsidy."[90] They are given, free of charge, the exclusive use of a precious and limited public resource. Licensees occupy, as this Court noted in *Red Lion,* "a preferred position conferred by the Government."[91]

—Licensees must comply with extensive federal regulation covering all aspects of the service they provide the public, a regulation so pervasive that the Com-

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[89] Through a curious constitutional *tour de force,* the intervening networks apparently have concluded that although access for noncommercial messages may be constitutionally required for transportation and recreation property like busses and parks, it is not required for licensed broadcast channels. See Brief for Petitioner American Broadcasting Companies, Inc. at 24; Brief for Petitioner Columbia Broadcasting System, Inc. at 24. The Commission also seems to imply that because the obligations of broadcast licensees to promote free speech are greater, their obligations to provide time to speakers are less. Brief for United States and Federal Communications Commission at 48 n.41.

[90] Kalven, *Broadcasting, Public Policy and the First Amendment,* 10 J. LAW & ECON. 15, 31 (1967). The characterization was contained in a memorandum prepared for CBS. The limited mailing rate subsidies enjoyed by printed periodicals until recently reduced did not approach in value or pervasiveness the benefits conferred on broadcast licensees; nor has the press ever been subject to the special and detailed regulation which for broadcast licensees is unavoidable. See *National Broadcasting Co.* v. *United States, supra.*

[91] 395 U.S. at 400. Returns on tangible investment for broadcast licensees in excess of 100% annually are not uncommon. See F. FRIENDLY, DUE TO CIRCUMSTANCES BEYOND OUR CONTROL 275-76 (1967).

mission has concluded that constitutional restrictions may have to be applied even to licensees' employment practices.[92]

—Because the number of frequencies is limited, broadcasting is "a medium not open to all" to exploit for profit.[93]

From these long-recognized distinctive features—public resource, preferred treatment, close governmental regulation, and physically limited number of frequencies—this Court has reasoned that broadcasting is constitutionally "a unique medium."[94] "Differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[95]

Beyond these, broadcasting as it has in fact developed shows other peculiarities which influence its role in public debate:

—Unlike printed media, the broadcast licensee's economic interest lies in minimizing, rather than increasing, coverage of ideas which are not of lowest-common-denominator mass appeal. A newspaper sells space, and the more features of interest to some group

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[92] See *Petition for Rulemaking To Require Broadcast Licensees To Show Nondiscrimination in Their Employment Practices*, 18 F.C.C.2d 240, 241 n.2 (1969); p. 74, *infra*.

[93] *Red Lion, supra*, 395 U.S. at 392. The statement that "unlike other modes of expression, radio is not available to all," *National Broadcasting Co.* v. *United States, supra*, 319 U.S. at 226, which the networks quote out of context, of course refers to the fact that broadcast *licenses* are limited in number, and broadcast licensees therefore are especially favored. The *NBC* opinion pointed this out by way of explaining the unique responsibilities which accordingly are imposed on licensees.

[94] *Red Lion, supra*, 395 U.S. at 390.

[95] *Id.* at 386 (footnote omitted); see also *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503 (1952).

it can add, the more copies it will sell. Television, however, sells time, and there is no way to add one feature without subtracting from time devoted to another. Each licensee seeks to maximize its audience at every moment. Hence the economic motivation of the networks is to avoid as much as possible showing anything that might not appeal to nearly every part of the audience.[96]

—Increasingly, as the court below recognized,[97] television and radio are the only truly mass media of communication in our society. Newspapers generally serve only a single metropolitan area. National magazines of general readership have found increasingly that a mass audience for them does not exist. Some, like *Colliers*, *Look*, and the *Saturday Evening Post* have gone out of business; others, like *Life*, have intentionally sought to reduce their circulation to reach a more specialized audience; others, like the *Saturday Review*, have attempted to split into several publications, each of more limited appeal. Increasingly the role of the printed press is localized or specialized. The closest one is able to come to assembling or speaking to the citizens of this country today, is to address them by television.

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[96] See generally F. FRIENDLY, *supra* n. 91, at 212-300. A CBS executive responsible for program decisions said frankly that his policy is to choose "not programs that he thinks people will necessarily *like*, or *benefit* from, or be enriched by, but programs he thinks people will watch." Thompson, *The Crapshoot for Half a Billion*, LIFE, Sept. 10, 1971, p. 47 (emphasis in original). See also Coase, *Evaluation of Public Policy Relating to Radio and Television Broadcasting: Social and Economic Issues*, 41 J. LAND AND P.U. ECON. 161 (1965); D. LACY, FREEDOM AND COMMUNICATIONS 69 (1961).

[97] App. 464.

B. The First and Fifth Amendments Forbid a Ban Which Discriminates Absolutely Against Paid Announcements on Political Subjects and in Favor of Commercial Advertisements.

One of the clearest rules of constitutional law is that when regulation of communication is permitted, the Constitution forbids a rule which favors one sort of speech over another. This Court reaffirmed that rule in two cases last Term, holding invalid under the Equal Protection Clause of the Fourteenth Amendment an ordinance which favored labor picketing over pickets on other subjects. *Police Dept.* v. *Mosley,* 40 U.S.L. Week 4877 (U.S. June 26, 1972); *Grayned* v. *City of Rockford,* 40 U.S.L. WEEK 4881 (U.S. June 26, 1972).[98] The same conclusion—that a public forum cannot be opened for one subject of discourse and closed to another—has also been reached in numerous decisions under the First Amendment.[99] In *Red Lion* itself, this Court noted that if that case had involved "a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves," then such a Commission policy "would raise more serious First Amendment issues." [100]

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[98] *Mosley* explicitly adopted the rule against speech discrimination stated in the concurring opinion in *Cox* v. *Louisiana,* 379 U.S. 536, 581 (1965). See 40 U.S.L. WEEK at 4879. This Court has recognized that the principles of the Equal Protection Clause are implicit in the Due Process Clause of the Fifth Amendment. *E.g., Bolling* v. *Sharpe,* 347 U.S. 497 (1954).

[99] See, *e.g., Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147 (1969); *Fowler* v. *Rhode Island,* 354 U.S. 67 (1953); *Niemotko* v. *Maryland,* 340 U.S. 268, 272-73 (1951). *Cf. Flower* v. *United States,* 407 U.S. 197 (1972).

[100] 395 U.S. at 396. See also *Lloyd Corp.* v. *Tanner, supra,* 40 U.S.L. WEEK at 4831.

In the present case, however, discrimination is conceded, as the Commission argues for the asserted right of its licensees to sell broadcast time freely for commercial advertising messages, but to ban it to political parties seeking to express views on matters of public concern, even though the political party asks no favors, and is willing to pay the going commercial rate. Heretofore this Court has indicated that speech on public issues is of greater constitutional concern than are product advertisements. Handbills containing ideas are constitutionally protected, when handbills with commercial messages are not. *Compare Schneider* v. *State,* 308 U.S. 147 (1939), *with Valentine* v. *Chrestensen,* 316 U.S. 52 (1942). Door-to-door solicitation for religious discussion is protected, when door-to-door solicitation selling magazine subscriptions is not. *Compare Martin* v. *City of Struthers,* 319 U.S. 141 (1943), *with Breard* v. *City of Alexandria,* 341 U.S. 622 (1951).[101] It does not disparage the commercial advertising system on radio and television to suggest that some fraction of the time for sale be sold for the type of discussion this Court has held of constitutionally greater significance.

What the networks seek is a constitutional inversion. The argue for an arbitrary and absolute policy barring political speech, while they sell all the time they reasonably can to virtually any hawker of commercial products. One would have assumed that if there were to be a constitutionally permitted discrimination between political and commercial speech on the licensed broadcast media, it would favor the political over the commercial. *Cf. New York Times Co.* v. *Sullivan, supra,*

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[101] See also *Wirta* v. *Alameda-Contra Costa Transit Dist.*, 64 Cal. Rep. 430, 434 P.2d 982 (1967).

376 U.S. at 266. Yet the petitioners seek to stand the First Amendment on its head and give total access to the sellers of soap, brassieres, deodorants, and mouthwashes, but none to advocates of ideas.

C. The First Amendment Forbids a Ban Which, in Barring Whatever a Licensee Labels "Controversial," is Both Unconstitutionally Vague and Overbroad.

The standard which the broadcast licensees propose to use—"controversial issues" [102]—to determine whether they will refuse to sell time is almost ludicrous in its ambiguity. This Court on many occasions has invalidated restrictions on speech in which the censoring authorities cited standards less open-ended. The rule was stated in *Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147 (1969):

> "[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.[103]

Nor can such a standard be applied in clear-cut fashion. For example, while BEM has been denied an opportunity to purchase time for announcements protesting United States participation in the war, hundreds of licensees sold millions of dollars worth of time to the United States Army to persuade young men to enlist in the infantry.[104] In the words of the Supreme Court of California, striking down a similar restriction:

> "A cigarette company is permitted to advertise the desirability of smoking its brand, but a cancer

[102] See, *e.g.,* App. 45, 50-51, 297.

[103] 394 U.S. at 150-151 (footnote omitted).

[104] *Cf. Green* v. *FCC,* 447 F.2d 323 (D.C. Cir. 1971) (attempt to obtain free time under fairness doctrine).

> society is not entitled to caution by advertisements that cigarette smoking is injurious to health. A theater may advertise a motion picture that portrays sex and violence, but the Legion of Decency has no right to post a message calling for clean films. A lumber company may advertise its wood products, but a conservation group cannot implore citizens to write to the President or Governor about protecting our natural resources. An oil refinery may advertise its products, but a citizens' organization cannot demand enforcement of existing air pollution statutes." [105]

In an era of consumerism, the "controversial" broadcast really can be nearly anything. Under the licensees' proposed policy, it is whatever the licensee wants it to be. Their asserted power to grant occasional exceptions simply intensifies the First Amendment violation.[106]

There is another flaw in the policy which the Commission endorsed: the total ban, instead of regulating expression in limited fashion to accommodate other essential social purposes, sweeps out in wholesale fashion any efforts to purchase time to communicate with the American public on radio and television. On many occasions this Court has held that restrictions on speech must be supported by a compelling interest, and must be narrowly drawn. Where restrictions are tolerated, the least restrictive means of accommodating speech

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[105] *Wirta* v. *Alameda-Contra Costa Transit Dist., supra,* 434 P.2d at 986-87.

[106] See, *e.g., Staub* v. *City of Baxley,* 355 U.S. 313 (1958); *Schneider* v. *State, supra; Lovell* v. *Griffin,* 303 U.S. 444 (1938); *cf. Flower* v. *United States,* 407 U.S. 197 (1972). The Commission itself described the same ban as "arbitrary" insofar as fundraising broadcasts were concerned, App. 272.

activities with other necessary social functions must be selected.[107] The total ban the licensees seek is the most restrictive, far beyond what is required for an orderly and balanced program schedule.

D. First Amendment Rights of Political Association As Well As of Speech are Abridged by a Policy Which Totally Bars a National Political Party from Purchasing Time To Discuss Public Issues.

Besides guaranteeing the freedom of speech, the First Amendment preserves "the right to band together for the advancement of political beliefs."[108] This Court has recognized the unique and vital role which the national political parties play in our system of government. *Cf., e.g., O'Brien* v. *Brown,* 41 U.S.L. WEEK 4001 (U.S. July 7, 1972). Virtually since the beginning of our constitutional democracy, this Nation has employed political parties as a necessary adjunct to the electoral process. A Committee of the American Political Science Association has called them "indispensable instruments of government."[109] As "mobilizers of both democratic consent and democratic dissent,"[110] the major parties are "not therefore merely appendages of modern government; they are in the

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[107] See, *e.g., United States* v. *Robel,* 389 U.S. 258, 265 (1967); *NAACP* v. *Button, supra,* 371 U.S. at 438 (1963); *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960); *cf. Dunn* v. *Blumstein,* 405 U.S. 330, 343 (1972) (voting rights).

[108] *Hadnott* v. *Amos,* 394 U.S. 358, 364 (1968). See also, *e.g., NAACP* v. *Button, supra; NAACP* v. *Alabama ex rel. Patterson,* 357 U.S. 449 (1957); *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250-251 (1957).

[109] TOWARD A MORE RESPONSIBLE TWO PARTY SYSTEM 15 (1950).

[110] F. SORAUF, PARTY POLITICS IN AMERICA 23 (1968).

center of it and play a determinative and creative role in it." [111]

Talk by political parties is more than just political talk. It is the catalyst that produces peaceful governmental change. Free political discussion assumes "that government may be responsive to the will of the people and that changes may be obtained by lawful means." [112] The parties "are perhaps best fitted of all agencies to convert formless hopes or frustrations into proposals that can be understood, debated, and, if found appealing, approved by the people." [113]

Today a major political party cannot be barred from purchasing time on television, except by arbitrary will of the networks, and still fullfill its role. "Broadcasting, and television in particular, has indeed become indispensable to the political process of our nation." [114] A party without access to television is a party rendered partially impotent. "In a highly communicative world, access to the communications broadcast resource is partially equivalent to political power." [115]

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[111] E. SCHATTSCHNEIDER, PARTY GOVERNMENT 1 (1942); see also C. MERRIAM & H. GOSNELL, THE AMERICAN PARTY SYSTEM 1 (1969); J. JAMES, AMERICAN POLITICAL PARTIES 39 (1969).

[112] *Stromberg* v. *California*, 283 U.S. 359, 369 (1931); see also *Roth* v. *United States*, 354 U.S. 476, 484 (1957), holding that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social change desired by the people."

[113] C. ROSSITER, PARTIES AND POLITICS IN AMERICA 50 (1967).

[114] H.R. REP. No. 91-257, 91st Cong., 1st Sess. 6 (1969); see also S. REP. No. 91-751, 91st Cong. 2d Sess. 5 (1970); MCNEIL, THE PEOPLE MACHINE: THE INFLUENCE OF TELEVISION IN AMERICAN POLITICS (1968).

[115] Baran, *On the Impact of the New Communications Media Upon Social Values*, 34 LAW & CONTEMP. PROB. 244, 249 (1969).

The tasks of a major political party are not limited to soliciting funds.[116] They are not confined to the weeks before an election. When to seek the electorate's political and financial support is a judgment which must be by the party, not by the networks. If the networks usurp the parties' necessary role, the parties and the political process will be correspondingly weakened.

The alternatives are not attractive to contemplate. At the least, groups would be encouraged to engage in sensational or outrageous conduct in order to create the kind of photogenic "happenings" which are likely to be shown on television as "news." At the worst, significant numbers of persons might come to believe themselves so closed off from access to peaceful political discussion that they would opt for violence instead. As the Court of Appeals for the Second Circuit observed in invalidating a ban on public issue advertising by the administrators of a publicly owned bus terminal,

> "We should in these times be mindful that to the extent we secure legitimate and orderly access to means of communication for all views, we create conditions in which there is no incentive to resort to more disruptive conduct." [117]

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[116] Televised appeals for funds have been effective. One appeal by then Republican Chairman Dean Burch in 1964 produced 70,000 letters and 3500 money orders in three days. See Alexander & Meyers, *The Switch in Campaign Giving*, FORTUNE, November 1965, p. 212. A handful of network solicitations in 1968 produced nearly $800,000 for Senator Humphrey. App. 21. The Democratic Party's 1972 Telethon reportedly has produced pledges of approximately $5,000,000. Every commission and task force which has studied the subject has concluded that broadening the base of political contributions, as television can do, is desirable. See, *e.g.*, TWENTIETH CENTURY FUND, COMMISSION ON CAMPAIGN COSTS IN ELECTRONIC ERA, VOTER'S TIME 44 (1969). The Commission agrees. *Lawrence M. C. Smith*, 25 P. & F. RADIO REG. 291, 293 (1963).

[117] *Wolin* v. *Port of New York Authority*, 392 F.2d 83, 93 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

If the DNC were an advertiser demanding time to sell soapflakes or razor blades, that would be another case. If the DNC were claiming a right to preempt any time it wanted for its messages, that would be another case. If the DNC were claiming a right to unlimited amounts of time, or a right to time without reasonable restrictions, that would be another case. If the DNC were claiming a right to disrupt programming schedules, that would be another case. If the DNC were claiming a right to space in media which operate using private resources, rather than on physically limited channels established by and belonging to the public, that would be another case. And if the DNC were not seeking to promote and maintain a system of political communication and organization which the Court has said is constitutionally protected, that would be another case.

But all the Democratic National Committee asks is that to some reasonable degree, the opportunity to contact the public directly over the public's airwaves at the going commercial rate be kept open. To recognize this First Amendment need is to do no more than preserve the necessary political dialogue which is "the essence of self-government." *Garrison* v. *Louisiana*, *supra*, 379 U.S. at 75.

E. Permitting Some Paid Discussions By Political Parties Will Avoid Governmental Censorship and Will Not Present Serious Administrative Problems.

As previously noted, the policy for which the Democratic National Committee argues and which the Court of Appeals upheld holds no surprises: the Commission and the industry have tried it before, for many years, with no ill effects whatsoever.[118] Yet the net-

[118] See pp. 19-26, *supra*.

works claim that to require of them something more than a flat, arbitrary ban on paid broadcasts on public issues would involve the Government too deeply in their activities and put in jeopardy their First Amendment rights. Such arguments, of course, are familiar. They have been raised by broadcast licensees against the important attempts to regulate their activities since the Communications Act was passed, and have been consistently rejected by this Court. See, *e.g.*, *Red Lion, supra; National Broadcasting Co.* v. *United States, supra.* A sufficient answer was given by this Court three years ago in *Red Lion,* when it said that in the unique broadcast medium, to require licensees to exercise their trust consistently with First Amendment objectives, "enhance[s] rather than abridge[s] the freedoms of speech and press protected by the First Amendment." [119]

But the intervenors' arguments are even less apt in this case than they were when they attacked the fairness doctrine in *Red Lion.* The relief ordered in the present case—that the Commission draw reasonable rules which do not totally bar purchase of time by responsible persons to discuss public issues—does not threaten to involve the Commission deeply in program content. On the contrary, unlike the fairness doctrine, permitting some purchase of time promotes robust discussion not through government monitoring of program content, but rather through the system of private ordering. It does not place total reliance on governmental threats or raised eyebrows to make the licensees do their job. Instead, it looks to the persons who are advocates to present topics of debate, subject to the

[119] 395 U.S. at 375.

general guidelines the Commission may deem appropriate. To complement the managed economy of the fairness doctrine, it offers in the context of the broadcast medium something approaching the "free trade in ideas" which is what the First Amendment is all about.

No one is suggesting any limitation on the right of broadcast journalists to report, analyze and interpret the events of the day. The court below fully recognized the need to accommodate the free speech interests of the broadcast licensees themselves. It concluded that those interests did not require them to use completely every minute of every broadcast day, and that those interests were less compelling in time that the licensees had already put up for sale to others. It directed the Commission to take the licensees' legitimate interests into account in formulating appropriate regulations, and to leave "room for broad exercise of the broadcasters' discretion."[120] In any event, the free speech rights of the broadcast licensees, as this Court has held, are not absolute. "The right of free speech of a broadcaster . . . does not embrace a right to snuff out the free speech of others." *Red Lion, supra,* 395 U.S. at 387.[121]

Since the DNC is asking, not for free time, but simply to buy at the going rate, no economic loss to the

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[120] App. 464, 484.

[121] This Court has ordered even a newspaper to grant access for paid advertisements under appropriate circumstances. See *Lorain Journal Co.* v. *United States,* 342 U.S. 143 (1951). *Cf.* the compulsion sometimes imposed to provide broadcast time to a particular individual. *Cf. Nicholas Zapple,* 23 F.C.C. 2d 707 (1970). The Commission last year over licensee protests entered an order requiring licensees to set aside one hour of prime time each evening for access for programs not being transmitted by a network. 47 C.F.R. § 73.658(k). The licensees have generally used that hour for re-runs of old network crime and situation-comedy shows. *Cf.. e.g., TV Channels,* Washington Post, Aug. 6, 1972, *passim.*

licensees is involved. Perhaps the licensees fear that broadcast of announcements on political matters might lessen their ability to appeal to the widest possible number of viewers, and thereby lessen audience ratings and possibly advertising revenues from other advertisers. The concern is speculative. The licensees appear to have survived the broadcasting of paid political messages during political "campaigns" without lasting ill effect. Moreover, it is not the maximizing of licensee revenues, but the interest of the viewers, which is paramount. And in any event, the Court of Appeals specifically required the Commission to be sure that the licensees were protected from actual financial harm.[122]

The licensees might fear that broadcasting of paid announcements by proponents of political views might trigger a fairness obligation to broadcast opposing views even if the opponents cannot pay. The answer to this is, first, that any such obligation is one of general fairness, not the rigid equal time requirement for candidates under § 315, so that the Commission can formulate rules to keep the reply right doctrine within reason; second, that the viewers' interest is paramount, and if any revenue loss cannot be absorbed in other charges and becomes crippling, there will be as this Court said in *Red Lion,* "time enough to reconsider;"[123] finally, that this Court has never had occasion to declare that there is a free right to reply to paid advertising, and the lower courts have applied such a doctrine extremely sparingly.[124]

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[122] App, 486. Licensees appear to have weathered the broadcasting of paid political announcements prior to elections without ill effect.

[123] 395 U.S. at 393.

[124] *Cf., e.g., Green* v. *FCC*, 447 F.2d 323 (D.C. Cir. 1971). Anti-smoking commercials were shown only about one-fifth as frequently as cigarette advertisements. Jaffe, *supra* n. 68, at 779.

Nor is there any basis whatsoever for the assertions by the networks that unless they have arbitrary power to ban all paid messages on public issues, the wealthy will buy up all the time. The Court of Appeals noted specifically that invalidation of the flat ban "does not close the door to 'reasonable regulations' designed to prevent domination by a few groups or a few viewpoints." [125] Many regulatory means are possible, and they can be modified if necessary.

The intervenors' forecasts of chaos come with particular ill grace since the very purpose of their seeking certiorari was to prevent any effort to develop reasonable rules as mandated by the Court below.[126] Their alarms seem all the more extravagant in light of their unfulfilled prophecies of doom in the past. In 1968 in *Red Lion* CBS told this Court that "the [fairness] rules, if upheld, would deter the broadcast of views on controversial issues" and "would have an insidious, if not totally destructive, effect upon many of these programs." [127] Nevertheless, today the same network uses no less than 195 pages of the printed record of this case in attempting to demonstrate that since (and apparently in spite of) the *Red Lion* decision "in quality as well as quantity, CBS has served the public increasingly well." [128] As for the Commission's complaints that formulating a rule will be a difficult task and lead to disputes, the court of appeals most experienced in reviewing the Commission's activities remarked in a related context, "The

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[125] App. 485.

[126] The Commission's brief concedes, at p. 58, that some of the disasters predicted "Perhaps . . . [are] not inevitable."

[127] Brief for Respondent Columbia Broadcasting System, Inc., No. 717, October Term, 1968, at 1-2, 4.

[128] App. 52; 48-242.

fears of regulatory agencies that their processes will be inundated . . . are rarely borne out." *Office of Communication of United Church of Christ* v. *FCC,* 359 F.2d 994, 1006 (D.C. Cir. 1966) (Burger, J.). And in any event this Court has said that when an agency has failed in its duty to safeguard rights it is charged to protect, "no room was left for administrative or expert judgment with reference to practical difficulties." *Boynton* v. *Virginia,* 364 U.S. 454, 459 (1960).

The fact is that there are no administrative obstacles here which the Commission cannot handle. That, after all, is the Commission's function; and all the court below asked was that it try. Any commission that feels itself competent to evaluate broadcast licensees in light of a standard of the "public convenience, interest or necessity," and to administer a doctrine of "fairness," surely must have enough administrative skill on hand to devise a reasonable way to permit a political party occasionally to buy time to talk directly with the public. The Commission's sudden modesty is both unprecedented and unbecoming.[129]

In short, the reports that the death of free broadcasting is imminent are greatly exaggerated. As this Court responded to similar claims in *Red Lion,* "if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quantity of coverage, there will be time enough to reconsider the constitutional implications." 395 U.S. at 393. That wise forbearance is even more appropriate where, as here, the Commission's rule has not yet even been formulated.

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[129] See *United Broadcasting, supra,* 10 F.C.C. at 518, where the Commission rejected the same arguments of administrative difficulty it today embraces.

F. The Ruling of the Commission is Subject to First Amendment Standards.

1. The Commission's Interpretation of Its Constitutional Responsibilities Is Subject to Judicial Review.

The intervenors in this litigation, CBS and ABC, (but not the Solicitor General or the Commission) devote considerable space in their briefs to arguing that their exclusionary policies do not involve "state action." The intervenors' analogies are beside the point. The issue here is whether the Federal Communications Commission is doing its job.[130]

When the Commission ruled that its policy was to uphold an absolute ban on the sale of time for political discussion, the DNC brought an action against the Commssion in the court below seeking review. CBS and ABC intervened, contending that their particular exclusionary rules were their business, a totally private decision. But what the DNC has maintained throughout is that the Commission's action does not square with the mandates of both the Communications Act and the First Amendment; and there can be no doubt that the Federal Communications Commission

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[130] Nor can it be assumed that the entire body of doctrine concerning the Fourteenth Amendment, beginning with the *Civil Rights Cases*, 109 U.S. 3 (1883), is to be applied mechanically and without analysis in totally different circumstances which do not involve that amendment at all, but rather the First Amendment—a provision framed at a different period in history, with different purposes on which depends the very functioning of our governmental system. CBS seems to concede that the "state action" limitations of the Fourteenth Amendment may not apply to the First in the same fashion—but asserts, without giving reasons, that the scope of the First Amendment, which protects "preferred" rights, is nevertheless to be more limited. See Brief for Petitioner Columbia Broadcasting System, Inc., at 23; see generally pp. 78-81, *infra*.

is subject to both. The intervenors, by injecting themselves into the dispute between the DNC and the Commission, cannot convert this litigation into a suit solely between private parties [131] and thereby bootstrap their right to intervene into a constitutional basis of decision.

The intervenors' curious argument would immunize from constitutional safeguards nearly all decisions by administrative agencies which authorize actions by regulated firms. For if an FCC order permitting the banning of paid political messages is not reviewable on statutory and constitutional challenge, what of a Federal Power Commission order granting a rate increase, or an Interstate Commerce Commission order permitting a discontinuation of service, or a Civil Aeronautics Board order granting a right to operate on a particular route? All of these are instances where a regulatory agency permits and

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[131] The intervenors (but not the Solicitor General or the Commission) cite two superannuated court of appeals decisions and a more recent ruling of a federal district judge as supporting their "state action" argument. The former two cases held simply that the plaintiffs had failed to exhaust their administrative remedies—that "the enforcement of the Act rests in the FCC and not in the district courts of the United States save for a right of review of the Commission's orders." The cases did not address total refusals to sell time to anyone to discuss "controversial issues"; and the loose dicta they contain are uninformed by more than twenty years of subsequent decisions by this Court. *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597, 600 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946); *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497, 500 (1st Cir. 1950). Finally, *Post* v. *Payton*, 323 F. Supp. 799 (E.D. N.Y. 1971), is not remotely in point; it held in a private suit for damages and injunctive relief that constitutional safeguards were not violated in an employment dispute when a licensee fired an employee for broadcasting alleged obscenities.

approves actions of the enterprises it regulates; but it has never been seriously contended that because those enterprises receive permission rather than direction, the order of the regulatory commission is thereby somehow immunized from judicial review on challenge by persons who are adversely affected by the order. The scope of such review is certainly no less when the agency is claimed to have violated the Constitution as well as its basic statute.[132]

Where the right of free speech is at stake, this Court has held that Government violates the First Amendment when it lends its authority to a system of private censorship. See *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58 (1963). Censorship is "hardly less virulent for being privately administered." *Smith* v. *California,* 361 U.S. 147, 154 (1939). This Court has held that governmental policies violate the First Amendment when they may tend unnecessarily to generate reticence and self-censorship by individuals. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 279 (1964); *Bantam Books, Inc.* v. *Sullivan, supra; Speiser* v. *Randall,* 57 U.S. 513 (1958). The First Amendment's intended system of open discussion which those cases recognize cannot exist when the Commission endorses the censorship of the public's airwaves by its licensees.

The Commission's policy here is certainly more fraught with governmental involvement than was

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[132] *Cf., e.g., United States ex rel. Chapman* v. *FPC,* 345 U.S. 153 (1953) (suit to set aside FPC order permitting construction of dam by private company); *Henderson* v. *United States,* 339 U.S. 816 (1950) (suit to set aside ICC order permitting racial segregation in dining cars of private railroad company); *Parker* v. *Fleming,* 329 U.S. 531 (1947) (suit to set aside order of Price Administrator permitting private landlord to evict); *Mitchell* v. *United States,* 313 U.S. 80 (1941) (suit to set aside order permitting racial segregation by private railroad company).

true in *New York Times Co.* v. *Sullivan, supra,* where private plaintiffs sought damages for the injury done them by private individuals. For a state to permit libel plaintiffs to inhibit free speech by damage claims, this Court held, was sufficient governmental involvement to bring First Amendment guarantees into play. Here the governmental involvement is all the greater: the Government is not a neutral arbiter, but is an active party to the litigation arguing for the policy it has approved. Just as government may not enforce unconstitutional conditions devised by a third party on a transfer of real estate from a willing buyer to a willing seller, so it may not enforce the unconstitutionally restrictive policies of a third person—the Commission's licensee—on the communication between a speaker and his audience. *Cf. Shelley* v. *Kraemer,* 334 U.S. 1 (1948).

2. The Broadcast Spectrum Is Public Property, Use of Which Has Been Delegated Subject to Detailed Federal Regulation

The airwaves belong to the public.[133] That the resource is in the public domain is itself persuasive that actions using the property in question are subject to constitutional restrictions. This is not to say, of course, that every government lessee is subject in all activities to the restrictions the constitution places on governments. But where the license confers an exclusive right over federal property; where the licensee's very existence depends upon the federal award; and where the policy in dispute is one which is central to the operation of the political system, then constitutional restrictions cannot totally vanish. Many

[133] See pp. 51-52, *supra.*

state and federal courts have so held.[134] Nor can an administrator of a public resource, required to promote "the public interest," assert the same interest in idiosyncratic private behavior as could, for example, the proprietor of a small restaurant or boarding house.

In *Lloyd Corp.* v. *Tanner,* discussed *supra,*[135] this Court emphasized that public property and private property are subject to differing constitutional standards for access. Rejecting a claim of right to use a private shopping center, this Court noted that where property is publicly owned "it has often been held" that "access . . . for purposes of exercising [First Amendment] . . . rights cannot be denied absolutely."[136] Also, the *Lloyd* opinion noted that the handbilling there was not consistent with the principal function of the property—sales—whereas communication is the broadcast frequencies' reason for being. And whereas in *Lloyd* alternative avenues for handbilling existed—"on any *public* street, on any *public* sidewalk, in any *public* park, or in any *public* building in the city of Portland," [137] there are no alternative radio and television channels; the Commission's licensees control them all.[138]

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[134] See, *e.g., Kissinger* v. *New York City Transit Authority,* 247 F.Supp. 438 (S.D.N.Y. 1967) (advertising space on city busses); *Farmer* v. *Moses,* 232 F.Supp. 154 (S.D.N.Y. 1964); *Hillside Community Church, Inc.* v. *City of Tacoma,* 455 P.2d 350 (Wash. 1969); *Wirta* v. *Alameda-Contra Costa Transit Dist., supra.*

[135] See pp. 50-51, *supra.*

[136] 40 U.S.L. WEEK at 4832.

[137] *Id.* at 4833 (emphasis supplied).

[138] Compare *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308 (1968), where access to private property was held constitutionally required when the alternative avenues would not be as effective, given the subject involved. See also

3. The Government Intimately Regulates the Operations of Broadcast Licensees and Confers On Them Unique Privileges

In *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), this Court noted that an action by a licensed entity may stand on a different constitutional footing if it has the considered approval of the governmental regulatory agency. Such approval was absent in *Irvis*; but it had been present, the Court noted, in *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451 (1952), so that a street car company's commission-approved policy of broadcasting to passengers was subject to constitutional restrictions.[139]

The decisions of this Court make clear that when government undertakes to regulate in detail a practice or group of pratices of a regulated entity, to that extent the practice can no longer be treated as wholly private. Thus in holding the privately owned street-car system subject to the First and Fifth Amendments this Court said:

> "We . . . recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. We rely particularly upon the fact that that agency, pursuant to protests against the radio program, ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed. . . ." [140]

Marsh v. *Alabama*, 326 U.S. 501 (1946). Also unlike *Lloyd*, competing interests based on the constitutional guarantees of due process of law and that private property shall not be taken without just compensation are not involved here.

[139] See 407 U.S. at 175-76 n.3; 343 U.S. at 462.

[140] 343 U.S. at 462 (footnote omitted).

The regulation of broadcasting by the FCC is more pervasive than that by the District of Columbia Public Utilities Commission. After full consideration the FCC approved the policy in question here. And, unlike *Pollak,* this case concerns not an incidental activity of the streetcar company, but the primary activity of the regulated entity—communications. Moreover, as noted previously,[141] the licensees enjoy "a spectacular subsidy" from the government.

The Federal Communications Commission itself believes that its regulation of broadcasting is so pervasive that constitutional guarantees may affect even the employment practices of its licensees:

> "[A] substantial case has been made that because of the relationship of the Government of the United States to broadcast stations, the Commission has a constitutional duty to assure equal employment opportunity.... The contention is rested upon such decisions as *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961)."[142]

Consistently with this view of its involvement in the activities of licensees, the Commission has eschewed the "state action" arguments put forth by the intervenors in this case.

The issue in this case cannot be resolved by a mechanical search for governmental involvement. Clearly, the Government is involved in many ways in the policy of the broadcasters. The question is whether, in light of the policies and assumptions expressed in our Constitution, such governmentally-involved action can es-

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[141] See p. 52, *supra.*

[142] *Petition for Rulemaking, supra* n.92, 18 F.C.C. 2d 240, 241 & n.2 (1969).

cape all Constitutional restraints.[143] "Only by sifting facts and weighing circumstances" can the appropriateness of particular constitutional safeguards in a particular situation be determined. *Burton* v. *Wilmington Parking Authority, supra,* 365 U.S. at 722. Whether the Commission is correct in believing that the licensor-licensee relationship in broadcasting parallels in all respects the "symbiotic relationship" which existed in *Burton*,[144] so as to make employment practices also subject to constitutional safeguards, it is certainly not difficult to take the smaller step of concluding that as to their communications activities the broadcasters have tremendous governmentally-imposed obligations to the public.

> "The argument that a broadcaster is not a public utility is beside the point. True it is not a public utility in the same sense as strictly regulated common carriers or purveyors of power, but neither is it a purely private enterprise like a newspaper, or an automobile agency. . . . A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. . . . After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust . . . ." *Office of Communication of United Church of Christ* v. *FCC,* 359 F.2d 994, 1003 (D.C. Cir. 1966).

All that is asked of these "fiduciaries" is that they behave as such, and respect the interest in free speech of those whose trust they hold.

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[143] *Cf.* Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment,* 30 So. Cal. L. Rev. 208 (1957).

[144] *Moose Lodge No. 107* v. *Irvis, supra,* 407 U.S. at 175.

4. Constitutional Restrictions May Not Be Avoided by a Governmental Grant of Authority To Take Unconstitutional Action, Particularly When the Grant Contradicts Previous Governmental Policy.

This Court has held that in certain circumstances when a governmental agency gives affirmative approval to action it could not itself constitutionally take, that action nevertheless is subject to constitutional restrictions. See *Evans* v. *Newton,* 382 U.S. 296 (1966); *Lombard* v. *Louisiana,* 373 U.S. 267 (1963); *compare Shelley* v. *Kraemer,* 334 U.S. 1 (1948), *with Buchanan* v. *Warley,* 245 U.S. 60 (1917).

Similarly, constitutional protections may not be avoided by government's granting permission to a third party to do what it may not do itself. In *McCabe* v. *Atchison, T. & S.F. Ry.,* 235 U.S. 151 (1914), a state statute authorized rail carriers to provide cars for white passengers but not for blacks. This Court made clear that in refusing service to blacks under this purely permissive statute, the railroad was "acting in the matter under the authority of a state law." 235 U.S. at 162. As this Court described the *McCabe* case, "This was nothing less than considering a permissive state statute as an authorization to discriminate and as sufficient state action to violate the Fourteenth Amendment in the context of the case." *Reitman* v. *Mulkey,* 387 U.S. 369, 379 (1967). Similarly, in *Nixon* v. *Condon,* 286 U.S. 73 (1932), when the state empowered the executive committee of a political party to prescribe voting qualifications for party members, this Court through Mr. Justice Cardozo held that the committee's action in barring blacks from voting was an expression of state authority which violated the Fourteenth Amendment. See also *Railway Employes' Dept.* v. *Hanson,* 351 U.S. 225 (1956), in which this Court held

that constitutional safeguards applied to a union contract when federal law made possible a union shop, even though "the union shop provision of the Railway Labor Act is only permissive." *Id.* at 231. When the most fundamental liberties of the people are at stake, the Government cannot vest its authority in another and then like Pilate proclaim its innocence. To their credit, the Government and the Commission do not attempt to do so in this case.

The present case, involving as it does the manner in which the licensee performs the very activity for which it is licensed, is an even clearer instance of governmental responsibility than was *Burton* v. *Wilmington Parking Authority, supra.* This court in *Burton* concluded that government had "elected to place its power, property and prestige behind the admitted discrimination" and by "its inaction . . . made itself a party to the refusal of service." *Id.* at 725. "[N]o state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be."[145] *Ibid.* Neither may the Federal Communications Commission.

Moreover, government may not change the rules, and then claim no responsibility for the policy which this

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[145] See also *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 726-727 (Stewart, J., concurring): "The highest court of Delaware has thus construed this legislative enactment as authorizing discriminatory classification based exclusvely on color. Such a law seems to me clearly violative of the Fourteenth Amendment." *Id.* at 729 (Harlan, J., dissenting): "If in the context of this record this means, as my Brother STEWART suggests, that the Delaware court construed this state statute 'as authorizing discriminatory classification based exclusively on color,' I would certainly agree, without more, that the enactment is offensive to the Fourteenth Amendment."

change would permit. In *Reitman* v. *Mulkey*, 387 U.S. 369 (1967), a change in state law was held in the circumstances to implicate the state sufficiently to invoke constitutional limitations. Here the Federal Communications Commission has attempted to depart from its previously settled policy in *United Broadcasting Co.* and subsequent cases.[146] Such a change of policy to permit a licensee arbitrarily to ban political parties from purchasing time to discuss public issues is not an instance of governmental neutrality sufficient to avoid the Constitution.

5. The First Amendment Does Not Permit Absolute Barring or Censorship by Broadcast Licensees of Paid Discussions of Public Issues.

This case involves not the Fourteenth Amendment, but the First. The First Amendment mandates a system of free and open discussion which this Court has held is an essential part of the functioning of our governmental system. See, *e.g.*, *Stromberg* v. *California*, *supra*. In making the delicate judgments required to determine the circumstances in which activities are subject to constitutional restrictions, this Court has given broader sweep to constitutional protection of the governmental process itself, particularly the process of peaceful change. Thus in *Smith* v. *Allwright*, *supra*, when a state allowed a private group to make basic decisions in its electoral process, this Court found a violation of the Fifteenth Amendment, observing that "Constitutional rights would be of little value if they could be thus indirectly denied." 321 U.S. at 664. And in *Terry* v. *Adams*, *supra*, four Justices stated that when the form of the electoral process was such that a private political group was "the decisive power in the country's recognized political process," it "takes

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[146] See pp. 19-26, *supra*.

on those attributes of government which draw the Constitution's safeguards into play."[147] Three other Justices agreeed that

> "It is immaterial that the State does not control that part of the elective process which it leaves for the Jaybirds to manage. The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern . . . ."[148]

And in the leading decision on application of the First Amendment to a federal licensee, the Amendment was held to apply directly. *Public Utilities Comm'n* v. *Pollak, supra.*

What these cases mean is that where there is dominant power to control the openness of the political process, particularly power to restrict the activities of a major political party, the Constitutional guarantees which protect the governmental process apply. They apply even when the process has not yet reached the formal stage. If it were otherwise, the process of peaceful change through orderly governmental procedures could itself be impaired, and there would be no effective remedy. *Cf. Baker* v. *Carr,* 369 U.S. 186, 258 (1962) (Clark, J., concurring).

Red Lion held that broadcast licensees are not so private that they may present only one side of an issue. "[T]here is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all." 395 U.S. at 392. The opinion leaves no doubt that fairness rules are constitu-

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[147] 345 U.S. at 484 (opinion of Clark, J.).

[148] *Id.* at 469 (opinion of Black, J.).

tionally required.[149] It seems unlikely that any court would hold that broadcast licensees might constitutionally refuse to sell time to blacks, or to women, or to Southereners. Or that they might charge advocates of some views higher rates than others. Is CBS so private that it could refuse to sell any time to a Jew because of his ethnic background and argue that it was up to him to prove that a fair quota of Jews had not been seen on its other broadcasts? The proposition seems absurd, and yet it follows equally from the logic by which networks claim the "private" right to show a major American political party on their own terms, in aspects they think important, eye-catching or colorful, and arbitrarily to deny it all opportunity to purchase time to speak for itself. The answer was given in *Red Lion:* "[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment."[150]

The power of the electronic media continues to increase and to influence the political process. Yet the networks now say they have no obligation to the First Amendment. This Court has traditionally spurned that "refined and metaphysical reasoning" which asks it to "explain away the constitution" and ignore the realities of its time. *Gibbons* v. *Ogden,* 9 Wheat. 1, 222 (1824). There is no reason here to "explain away" the First Amendment. The power and the responsibili-

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[149] See 395 U.S. at 390. *Accord, Jaffe, supra* n.68: "The Court held that the fairness doctrine, and even a right to command time, is not only tolerated by the First Amendment but is required by it." 85 HARV. L. REV. at 774 (footnote omitted). See also *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945).

[150] 395 U.S. at 390.

ties of broadcasting were clear almost from the start. Herbert Hoover foresaw them half a century ago:

> "Radio has passed from the field of an adventure to that of a public utility. Nor among the utilities is there one whose activities may yet come more closely to the life of each and every one of our citizens, nor which holds out greater possibilities of future influence, nor which is of more potential public concern."[151]

The potential for influence has been realized. The responsibilities must be, too.

CONCLUSION

For the reasons stated the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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August 14, 1972

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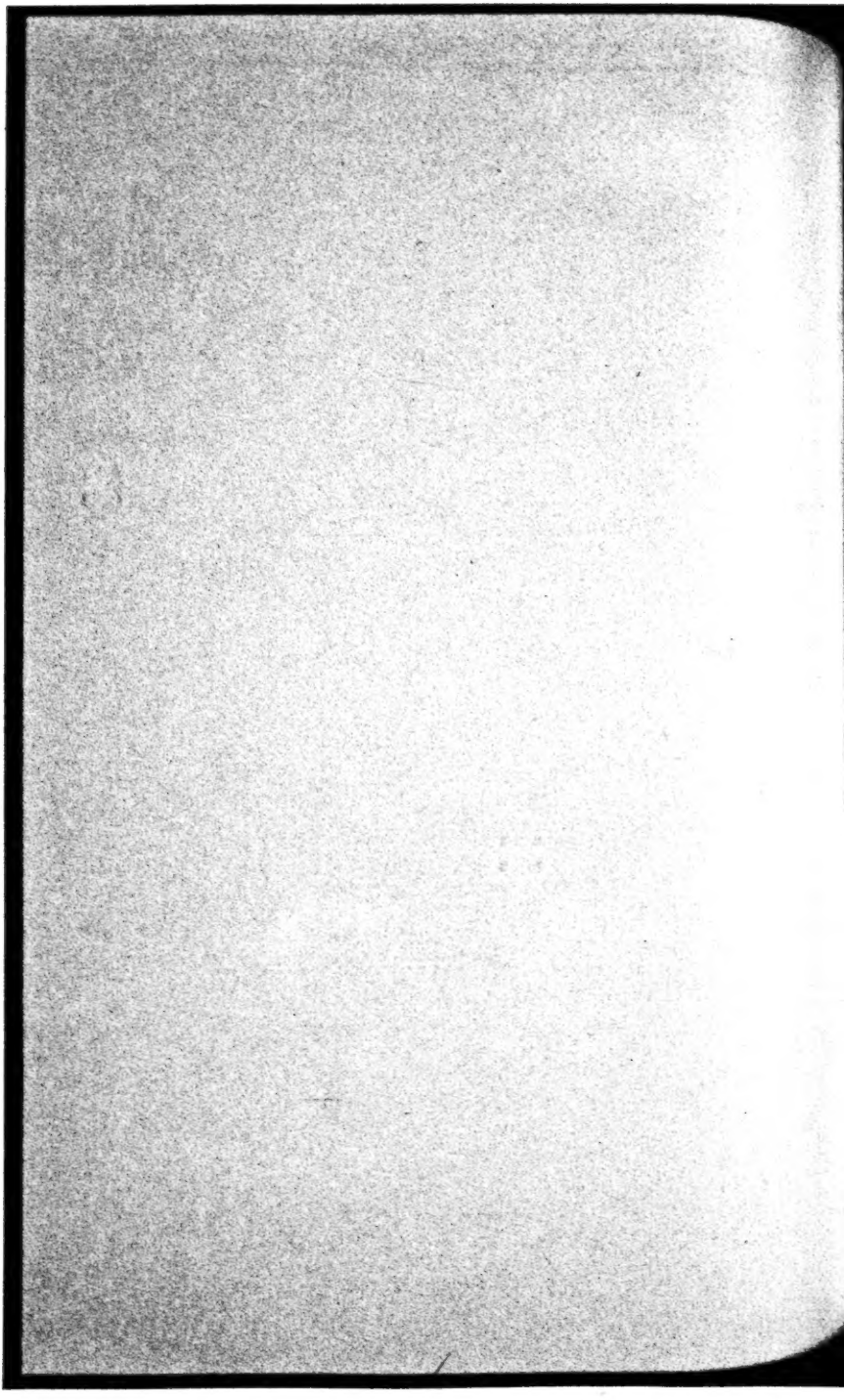
[151] U. S. DEPT. OF COMMERCE, RECOMMENDATIONS FOR REGULATION OF RADIO 2 (1924).



ADDENDUM

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Section 3(h) of the Communications Act of 1934, 48 Stat. 1065, as amended, 47 U.S.C. § 153(h), provides:

> " 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

Section 301 of the Communications Act of 1934, 48 Stat. 1081, 47 U.S.C. § 301, provides in relevant part:

> "It is the purpose of this chapter . . . to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by

Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions and periods of the license."

Section 303 of the Communications Act of 1934, 48 Stat. 1082, as amended, 47 U.S.C. § 303, provides in relevant part:

"Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * *

"'(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

* * *

"(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter. . . .

Section 307 of the Communications Act of 1934, 48 Stat. 1083, as amended, 47 U.S.C. § 307, provides in relevant part:

"(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

* * *

"(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor a renewal of such license may be granted from

time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. . . . Consistently with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action. . . ."

Section 309(a) of the Communications Act of 1934, 48 Stat. 1085, as amended, 47 U.S.C. § 309(a), provides in relevant part:

"Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

Section 315(a) of the Communications Act of 1934, 48 Stat. 1088, as amended, 47 U.S.C. § 315(a), provides:

"If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that

office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

"(1) bona fide newscast,

"(2) bona fide news interview,

"(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

"(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Section 326 of the Communications Act of 1934, 48 Stat. 1091, as amended, 47 U.S.C. § 326, provides:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 71-864, 71-865

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *Petitioners*

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE AND DEMOCRATIC NATIONAL COMMITTEE

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC., *Petitioner,*

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE

QUESTION PRESENTED

Whether the First Amendment permits a policy ratified by the Federal Communications Commission whereby its broadcast licensees sell advertising time to commercial spokesmen but maintain a flat ban on the sale of any such time to persons seeking to present views on controversial public issues.

STATEMENT

Respondent Business Executives' Move for Vietnam Peace (hereinafter "BEM") offers this additional statement to clarify the statement in the government's brief.[1] We specifically seek to make clear which issues were not before the court below, the limited nature of that court's decision, and the status of rulemaking proceedings presently pending before the Commission.

A. BEM'S ATTEMPT TO PURCHASE TIME

Respondent BEM is an organization of over 2,700 business executives from 49 states. It believes that the Vietnam war and its underlying policies are antithetical to the interests of the United States including its free enterprise system and economic well-being. Its members are responsible members of their respective communities; BEM does not as a rule engage in newsworthy acts, such as mass demonstrations or civil disobedience, to attract attention to its views. As the court of appeals noted, BEM depends "instead, on [its] ability to get a hearing—as full as possible and as direct as possible—from the general public" (App. 449).

BEM sought to purchase a 60-second segment of Washington, D.C. radio station WTOP's advertising time to broadcast the antiwar statements of prominent retired military leaders, businessmen, and scientists

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[1] Hereinafter cited as "U.S. Br." The brief of Petitioner Post-Newsweek Stations, Capitol Area, Inc. is cited hereinafter as "WTOP Br."; the brief of Petitioner American Broadcasting Companies, Inc. (No. 71-866) as "ABC Br."; the brief of Petitioner Columbia Broadcasting System, Inc. (No. 71-863) as "CBS Br."; and the *amicus curiae* brief of National Broadcasting Co., Inc. as "NBC Br."

(App. 298-306).[2] WTOP holds out for sale to commercial advertisers 18 of every 60 minutes it is on the air. The purchasers of 60 second segments of "spot" advertising time include Dr. Scholl's Foot Deodorant, Manishewitz Wines, and Bayer Aspirin. See Appendix A hereto. Yet WTOP refused to sell any advertising time to BEM. WTOP's reason was not that BEM's views were irresponsible, obscene, unnecessary or lacking in taste, but, instead, that:

> it is the policy of [WTOP] radio and television stations not to sell spot announcement time to individuals or groups in order to set forth a point of view on any controversial issue of public importance (App. 297).[3]

To BEM, WTOP's advertising time seemed an ideal forum in which to communicate its views to the federal government and the public. WTOP had precisely the audience BEM wanted to reach. In its promotional brochures, WTOP beseeches advertisers to present messages in their own words to a radio audience that includes "[m]ore members of Congress . . . than [the audience of] any other radio station,"[4] an audience

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[2] BEM's spot announcements contain statements by Rear Admiral Arnold E. True (ret.), Brigadier General William W. Ford (ret.), Mariner Eccles, former Chairman of the Federal Reserve Board, and Dr. Gerald Wald, a Nobel Prize winning biologist (App. 298-308).

[3] In subsequent pleadings before the Commission and the court below, WTOP did allege that it had presented views similar to those of BEM. But this allegation was in the context of responding to BEM's fairness doctrine complaint, which is not a subject of this action. As to the refusal to sell time, WTOP relied *solely* on its flat ban against selling time for the discussion of controversial issues. Indeed, as is more fully discussed below, (pp. 23-24) one of the petitioners' primary objections to the ruling of the court below is that it would allow speakers to present views on issues *not* being covered by the licensee.

[4] WTOP promotional brochure (Appendix B, hereto), p. 7.

some of whose members have "special kinds of Washington interests, [who] will open their minds to your special messages or campaigns which speak to large public issues."[5] Moreover, the cost was far below that of a comparable effort in any other medium. WTOP's rate card shows that $100 would purchase one minute of class AAA time, i.e., prime radio time,[6] and allow BEM to reach 46,000 listeners.[7] During other hours, the number of listeners that could be reached per dollar expended was even greater.[8]

B. PROCEEDINGS BEFORE THE COMMISSION

BEM asserted before the Federal Communications Commision that WTOP's flat ban on the sale of time for editorial advertisements violated the public interest

Monday to Saturday; Class AA time is

[5] *Id.* at 13.

[6] *Standard Rate and Data Service, Inc.*, Vol. 54, No. 6. Each day is split up into several time periods. For WTOP, Class AAA time is 6:00-10:00 AM, Monday-Friday from 3:00-7:00 PM, and Saturday from 10:00 AM to noon; and Class A time is all other time periods. The size of the listening audience will vary at different times within each class. For example, Class A period 10:00 AM-3:00 PM Sunday reaches about 28,000 people while Class A period 7:00 PM to midnight reaches about 16,000 listeners. The cost of purchasing advertising time is apparently determined not only by the size of the audience, but by its demographic composition and buying habits as well. An advertiser presumably picks its time buys based on when the type of listener it wants to reach is most likely to be listening. See text and note following this note.

[7] *American Research Bureau Radio Estimates.* January 13-February 9, 1972. The rate card cost of one minute of Class AA time, reaching about 25,000 people, is $75, while Class A time, which reaches between 10,000 and 34,000 people, depending on the particular time segment involved, is $45 for one minute.

[8] See note 7, *supra.*

standard of the Communications Act and the First Amendment's free speech guarantee. In addition, it asserted that WTOP had violated the fairness doctrine in its coverage of the war (App. 291-296, 320-326, 346-348).

Several months after BEM complained of WTOP's action to the Commission, the Democratic National Committee ("DNC") sought a declaratory ruling that a "broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues" (App. 15). In response, two of the three major radio and television networks revealed that with respect to editorial advertisements, they employed policies similar to WTOP's. Except for sales to political candidates, ABC would not sell advertising time for expressing controversial views absent special public interest considerations (App. 42-46).[9] CBS would sell no advertising time for the discussion of controversial issues (App. 58-80).[10] NBC simply stated that it has no policy which prevents it from selling "program time" to a "major national political party during non-campaign periods" to discuss public issues (App. 47).

The Commission ruled against both BEM (App. 357 *et seq.*) and DNC (App. 247 *et seq.*) on the same day in separate but cross-referenced opinions. Although there was no evidence of any harm to WTOP if it carried BEM's editorial advertisements — indeed WTOP never asserted it would suffer any injury— the Commission sustained WTOP's flat ban on editorial

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[9] See also ABC Br. at 7-8.

[10] See also CBS Br. at 7.

advertisements. It stated that a licensee's obligations under the fairness doctrine "to present *representative* community views on controversial issues . . ." (App. 367) was adequate under both the public interest standard and the First Amendment (App. 266) to implement our "profound national commitment that debate on public issues should be uninhibited, robust, and wide open" (App. 259). The Commission noted that Section 3(h) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 153(h), declares that broadcasters are not "common carriers." It implied that to require any broadcaster to sell *some* of its spot advertisement time to *someone* at *sometime* might be inimical to this provision (App. 366-67).

In *DNC*, the Commission employed essentially the same reasoning, in an opinion cross-referenced to BEM. (App. 269-73). It further held that it would be arbitrary and contrary to the public interest for a licensee to refuse to sell time to the DNC or other significant political parties for the purpose of soliciting funds[11] (App. 269-73).

To summarize the Commission's holdings: a licensee that regularly allocates time for sale to commercial sponsors need not sell any of that time to groups wishing to present editorials on controversial issues. A licensee must sell spot announcement time to a significant political party to raise money but not to discuss controversial issues. However, a licensee need not sell any time to other groups either to discuss controversial issues or to raise money.

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[11] No party below sought review of this determination and its rectitude is *not* before this Court.

C. THE DECISION OF THE COURT OF APPEALS

BEM and DNC each filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.[12] On August 3, 1971, the court of appeals issued a single opinion reversing the Commission's orders in both *BEM* and *DNC*. Relying on *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), Judge Wright, writing for himself and Judge Robinson,[13] stated that editorial advertisements are an important form of speech (App. 473-74). An "unbroken line of authority" (App. 475) has held that, once the operators of public forums have opened them to speech, they may not discriminatorily bar controversial speech (App. 478).

On First Amendment grounds, the court struck down the flat ban policy under challenge.[14] It left undisturbed all other aspects of the regulatory scheme:

> Under attack here is a common practice in the broadcast industry—airing only those paid presentations which advertise products or which deal with "noncontroversial" matters, and confining the discussion of controversial public issues to formats such as the news or documentaries which are tightly controlled and edited by the broadcaster. In the Commission's view, an attack on the permissibility of this practice "goes to the heart of the system of broadcasting which has developed in this country." We disagree. The actual

[12] BEM did not contest the Commission's fairness doctrine ruling.

[13] Judge McGowan dissented.

[14] The court later noted that a policy of excluding editorial advertisements on issues which a broadcaster had fully and fairly covered in its programming (see p. 3 note 3, *supra*, and accompanying text) might be more defensible than a flat ban (App. 471).

> case before us is relatively narrow and we decide it narrowly. We do not have to cut to the "heart" of our system of broadcasting; we leave undisturbed the licensee's basic right to exercise judgment and control in public issue programming and the sale of advertising time. All we do is forbid an *extreme*[15] form of control which totally excludes controversial public debate from broadcast advertising time.
>
> We hold specifically that a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted (App. 448-49), (footnote omitted).

Because this case came to the court below from an administrative agency charged with primary regulatory responsibilities in this area, an agency which may draw upon its own expertise and that of its licensees, the court did not order that BEM's or DNC's or any other specific group's advertisements must be accepted by any broadcaster.

> We do not hold, however, that the planned announcements of the petitioner—or, for that matter, of any other particular applicant for air time—must necessarily be accepted by broadcast licensees (App. 449).

Rather it confined itself

> to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many "editorial advertisements" will be put on the air (App. 449).

The court made clear that "broadcast time is necessarily limited" (App. 467). Thus non-discriminatory paid access to the broadcast media is a "reasonably regulated 'abridgeable' " right (*Id.*)—that is, a "*limited*" right to speak (App. 453).

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[15] Emphasis in original, this footnote added.

D. THE COMMISSION'S ACCESS INQUIRY

On June 11, 1971, almost two months before the decision of the court below, the Commission issued a *Notice of Inquiry in Docket 19260, Study of Fairness Doctrine,* 30 F.C.C. 2d 26, 36 Fed. Reg. 11825. The Commission's stated purpose was "to institute a broad-ranging inquiry into the efficacy of the fairness doctrine and other Commission public interest policies, in light of current demands for access to the broadcast media to consider issues of public concern." *Notice of Inquiry, supra,* 30 F.C.C. 2d at 26. Citing *New York Times Co.* v. *Sullivan, supra,* the Commission expressly noted its concern with First Amendment as well as purely statutory interests. *Id.* at 27.

Part IV of the Inquiry sought comments on access to the media for the discussion of public issues. *Id.* at 33. Citing its decisions in *BEM and DNC*, the Commission stated that it had rejected the concept of a paid right of access because "there is neither Constitutional nor statutory right for any individual or group to present their views, and as a matter of policy it would not serve the public interest to act as if there were." *Ibid.*[16]

On August 3, 1971, the court of appeals rendered its decision reversing the Commissions rulings in *BEM* and *DNC*. The mandate of the court was issued on October 22, 1971. On February 7, 1972, after this Court initially refused to stay the mandate of the court below, the Commission, in compliance with that mandate, released a *Further Notice of Inquiry*, 33 F.C.C. 2d 554, 37 Fed. Reg. 3383, soliciting comments for the purpose of developing guidelines governing broadcaster acceptance of editorial advertisements.[17] However, when this

[16] The government devotes considerable attention to the *Inquiry*. See U.S. Br. at 13-15, 18-20, 60.

[17] The specific issues to which the public was asked to address are set out in the Government's Brief at 18, n.7.

Court subsequently did stay the mandate of the court below, the Commission, on March 3, 1972, issued an *Order and Further Notice of Inquiry*, 33 F.C.C. 2d 798, 37 Fed. Reg. 4980, withdrawing the February 7, 1972, *Further Notice of Inquiry* on the ground that "[t]he matters raised in that Notice must await decisions by the SupremeCourt. Our action in this respect must be taken in the context of definitive resolution by that Court of the basic issues of the case." *Ibid.* Thus, in the pending proceeding the Commission has limited its scrutiny to "the non-Constitutional aspects [of the original, June, 1971, *Notice of Inquiry*] which may differ greatly from the issues posed in the Further Notice and now withdrawn." *Id.* at 798-99.

SUMMARY OF ARGUMENT

This case raises the question whether the federal government may permit broadcast licensees to discriminate against speech on the basis of its content. The court of appeals ruled that the First Amendment prohibits broadcasters, who routinely sell advertising time to commercial spokesmen, from flatly refusing to sell such time to spokesmen for controversial issues. In doing so, the court neither created a new right to speak, nor dictated a new scheme of broadcast regulation. It simply held that the arbitrary discrimination against "controversial" speech within the existing regulatory scheme cannot stand.

I. The First Amendment prevents the government from restraining speech for any but the most compelling reasons. The petitioners do not even pretend that compelling reasons exist to justify restraints on controversial advertising. Indeed, there can be no legally sufficient reasons to warrant discrimination against all controversial speech because of its content.

A. The refusal of broadcasters to sell advertising time to spokesmen for controversial issues—while selling such time to commercial spokesmen—discriminates against speech solely because of its content. This Court affirmed again last Term that the First Amendment prohibits such discrimination. *Police Dept. of City of Chicago* v. *Mosley,* —— U.S. ——, 92 S.Ct. 2286 (1972).

Further, the discrimination here works against the precise values that the framers of the First Amendment expected to protect. It grants commercial speech a preferred status in the market-place of communications vis-a-vis "editorial" or controversial speech. If anything, commercial speech should enjoy less, not more scope than political speech. See *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942). Instead, the broadcasters have turned the First Amendment upside down by subordinating the very kinds of controversial speech that this Court has scrupulously protected.

Finally, discrimination in the broadcasting media does not even purport to rest on a neutral basis. It does not operate to exclude all controversial spokesmen even-handedly, but selects one—the licensee—who arrogates for himself the right to speak for all the others. It permits the "trustees" of the nation's most influential communications media to freely pick and choose among ideas, broadcasting only those *they* find to their liking or which *they* judge the public *ought* to hear.[18]

B. Compliance with the fairness doctrine—and its obligation to cover controversial *issues*—does not entitle broadcasters to discriminate against the controversial speakers.

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[18] The broadcaster petitioners all indicate in their briefs that they wish to retain the right to exclude from the airwaves issues which, in their view, are "inappropriate" (ABC), "insignificant," "trivial," "unsuitable" (CBS), beyond . . . good taste" (NBC), or "narrow," "slight" (WTOP).

Editorial advertising serves First Amendment values that the fairness doctrine cannot satisfy. It permits the speaker to select a subject the broadcaster might not otherwise air. It allows the speaker to control its timing, its format, its content and its presentation. Indeed, controversial spokesmen have at least the same need to speak for themselves that commercial advertisers are provided.

Broadcasters operate uniquely important forums for speaking to mass audiences. Voluntarily selling time to commercial advertisers, they cannot now claim that the advertising mode of speech is somehow inappropriate to their forum.

The fairness doctrine requirement of balanced journalistic coverage of some issues is not an adequate substitute for editorial advertising. A process in which a handful of governmental licensees are given exclusive control over all controversial speech—what issues to cover, which spokesmen to permit on the air, what format to employ—does not generate the diversity and robust debate which the First Amendment requires in a free and open society.

II. The fairness doctrine was not designed, nor has it traditionally functioned, to supplant individual editorial speech. To the contrary, the doctrine arose in cases which sought to assure that licensees would air all sides of important controversial issues by selling or giving individuals time to discuss the issues directly.

III. The elimination of discrimination against controversial paid editorial announcements will not disrupt the broadcasting system. The wealthy need not dominate all available time. Licensees need not suffer financial sacrifice. Government need not supervise broadcaster decisions any more than it now does under the fairness doctrine. And broadcasters will not be

treated as "common carriers" and forced to accept a plethora of editorial advertisements. The court below simply held that, as to airtime which broadcasters *elect* to market to others, flat discrimination against controversial speech is constitutionally impermissible.

IV. There is sufficient state action in the present case to invoke the protections of the First Amendment. Three elements, in particular, combine to implicate the government in the discriminatory policies of the broadcasters.

For one, the entire scheme of broadcast regulation has created a complicated and detailed interdependency between the Commission and its licensees. The licensee receives a governmental grant of property (the airwaves) in the nature of a leasehold. As a condition of that license or lease, stations are required to operate in the public interest in a manner consistent with the First Amendment. See *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961).

Further, the Commission, by its rulings in *BEM* and *DNC,* has given official government approval to the discriminatory policies of the broadcasters. Those policies are no longer individual "private" decisions. Rather, the Commission has given notice that it finds those policies perfectly consistent with the scope of public responsibility in broadcasting. The government has taken a broadcaster policy and made it its own.

Finally, the public airwaves are too important a forum for speech to escape the protections of the First Amendment. Like sidewalks and parks, they are inherently part of the public domain. Broadcasters, acting for their own interests, cannot appropriate that forum for themselves without subjecting themselves to public responsibility.

ARGUMENT

I. A FLAT REFUSAL TO SELL ADVERTISING TIME TO SPEAKERS WITH "CONTROVERSIAL" VIEWS BY A BROADCASTER WHO GENERALLY SELLS SUCH TIME FOR COMMERCIAL VIEWS WAS CORRECTLY HELD BY THE COURT BELOW TO COMPRISE UNCONSTITUTIONAL DISCRIMINATION.

The First Amendment recognizes that "speech" is not a right to be conferred or withheld by law, but a fundamental "freedom" which inheres in all citizens. This freedom of course is not absolute. It is protected only against governmental incursions and must often be balanced against other constitutional interests—the right of a private homeowner or club to privacy, or a municipality's need to keep its streets clear for traffic. But "the preferred place given in our scheme to the ... freedoms secured by the First Amendment . . . gives these liberties a sanctity and a sanction not permitting dubious intrusions." *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945). Governmental curtailments of protected speech "must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Ibid.*[19]

Suppression of particular speech because of its *content,* however, is emphatically *not* a legitimate governmental interest. The First Amendment was conceived to stop the government from picking and choosing between ideas, selectively suppressing those it found objectionable, and letting others pass. That Amendment must invalidate a "policy" that silences only the self-

[19] Compare *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968), holding that the Government cannot impose even "incidental" restrictions on speech without advancing an "important or substantial governmental interest" which is "unrelated to the suppression of free expression" and no greater than "essential to the furtherance of that interest."

initiated editorial speech that a governmental licensee deems "controversial."

A. THE FIRST AMENDMENT BARS DISCRIMINATION AGAINST CONTROVERSIAL SPEECH.

The Commission and its licensees seek to perpetuate a highly discriminatory scheme for allocating that limited portion of its airtime which a broadcaster *elects* to market to advertisers. A licensee must accept fund raising spots for "significant" political parties (App. 272), but may reject them from smaller parties and voluntary organizations like BEM. It may sell time to political candidates to discuss controversial issues, but may refuse to sell BEM time to discuss the same issues. Licensees may present their own controversial views in a short editorial format,[20] yet flatly refuse to sell BEM, DNC and all other members of the public any time in the same format.

Finally, a licensee which accepts paid advertisements for commercial speech, may refuse to sell time for *controversial* speech.[21] If one wishes to speak about the

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[20] The Commission even encourages licensees to use this editorial form. See *Report on Editorializing*, 13 F.C.C. 1246 (1949); cf. 47 C.F.R. §§ 73.123, 73.300, 73.679 (1972).

[21] Licensees, nevertheless, often sell time for controversial *commercial* speech. Although the Commission ruled that cigarette commercials comprised "controversial" speech (*Cigarette Advertising (WCBS-TV)*), 9 F.C.C. 2d 921, *aff'd, Applicability of the Fairness Doctrine to Cigarette Advertising*, 10 F.C.C. 2d 16 (1967), *aff'd, Banzhaf* v. *F.C.C.*, 405 F. 2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969)), most licensees continued to sell cigarette manufacturers time. And although advertisements for high-powered automobiles and gasolines also raise controversial environmental issues of public importance (*Friends of the Earth* v. *F.C.C.*, 449 F.2d 1164 (D.C. Cir. 1971)), licensees today continue to sell their manufacturers time. But see CBS' disclaimer (CBS Br. 41). See also *Wilderness Society and Friends of the Earth*, 30 F.C.C. 2d 643 (1971) (NBC ads on "controversial" Alaskan pipeline; *Center for Auto Safety*, 32 F.C.C. 2d 926 (1972) (ABC and NBC ads on "controversial" automobile air-bag safety device).

merits of mouthwash, beer or automobiles, in other words, the broadcaster's door is open; but if one desires to speak about hunger, consumer exploitation or the war, the door slams shut. This discrimination based solely on the content of speech is constitutionally unacceptable.

Such selective discriminations against "controversial" speech bear a heavy presumption of invalidity.[22] The First Amendment was designed to restrain the Government from rummaging through the thoughts and beliefs of its citizens, approving those it favored, suppressing those it opposed. And although there may be legitimate governmental interests in regulating the time, place and manner of speech in public forums,[23] the *content* of the speech,[24] its controversiality,[25] or even its intensity,[26] cannot be the determining factors.

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[22] It goes without saying, of course, that the term "controversial" is "extraordinarily vague" (App. 479).

[23] See, e.g., *Adderly* v. *Florida*, 385 U.S. 39 (1966) (demonstration in jail courtyard).

[24] "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of City of Chicago* v. *Mosley*, U.S. , , 92 S. Ct. 2286, 2290 (1972). The Court of appeals below also cautioned, "The content of the idea which the excluded speakers seek to promote is — emphatically — *not* permitted as a distinguishing factor in itself" (App. 477). See also *Danskin* v. *San Diego Unified School Dist.*, 28 Cal. 2d 536, 171 P. 2d 885 (1946).

[25] See, e.g., *Edwards* v. *South Carolina*, 372 U.S. 229 (1963) (demonstration on State House grounds); *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949) (harsh language).

[26] See, e.g., *Saia* v. *New York*, 334 U.S. 558 (1948); *Wollam* v. *City of Palm Springs*, 59 Cal. 2d 276, 379 P. 2d 481 (1963); 29 Cal. Rptr. 1; compare *Kovacs* v. *Cooper*, 336 U.S. 77 (1949).

As the court below acknowledged, First Amendment law governing the access of speakers to particular forums is an exercise in balancing their protected interests in speech against the extent to which other legitimate forum uses may be disrupted (App. 476). In the typical case, speech interest of the government are weighed against certain *non*-speech interests such as discipline in public schools,[27] the legislative process in a state capitol,[28] or the tranquility of a public library.[29] In the case of broadcasting, however, there are no non-speech interests to be balanced against individual speech.[30] Rather, the speech rights of individuals and licensees seeking to share the same speech forum must be balanced against each other.

Where the forum has already been opened to speech in the form of advertising or "commercial editorials," however, and where the Government and its licensees selectively bar only "controversial" speech in editorial form, the arguments advanced to justify this pervasive form of discrimination are invalid for two reasons. First, the Government's arguments for singling out and suppressing only "controversial" advertisements cannot be weighty if they are waived selectively for commercial and non-controver-

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[27] *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503 (1969).

[28] *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Edwards* v. *South Carolina, supra.*

[29] *Brown* v. *Louisiana*, 383 U.S. 131 (1966).

[30] The airwaves, after all, are dedicated solely to speech purposes. The Communications Act of 1934 requires the "fair, efficient, and equitable distribution of *radio service.*" 47 U.S.C. §307 (b) (1964) (emphasis supplied).

sial advertisements.[31] Having opened a portion of his airtime for sale to mercantile members of the public, the licensee cannot maintain that the advertising mode is inherently disruptive or an unsatisfactory technique for speech by outsiders. Second, selective waivers indicate the government has let slip the blindfold of neutrality and seeks to "pick and choose among the views it is willing to have discussed."[32] It seeks not to regulate, but to censor. Such action is constitutionally impermissible.

The court below applied this analysis to broadcasters' bans on controversial editorial speech. After leaving "open the possibility that broadcasters may constitutionally relinquish no time at all for advertising of any sort" (App. 475), the court stated:

> [T]he issue in these cases is the permissibility of discrimination, within a given block of advertising time, against 'controversial' speech and in favor of commercial and 'non-controversial' speech. We deal here with a forum that already has been opened up by the licensees themselves, opened up for direct broadcast presentations by members of the public (App. 475).

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[31] If Government states its intent to prevent littering in the public parks, for example, yet allows the Rotary Club but not the Jehovah's Witnesses to leaflet, then its "littering" justification must be rejected as insubstantial. See *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Schneider* v. *New Jersey*, 308 U.S. 147 (1939).

[32] *Cox* v. *Louisiana*, 379 U.S. 536, 581 (1965) (Black, J., concurring). Where the Government or its licensees selectively admit some speech and bar only "controversial" speech, "the rationale for regulation is fatally impeached. The objection can then no longer be keyed to other uses of the public places [e.g., the broadcast forum], but would appear to implicate the kind of message that the groups were transmitting. The regulation would thus slip from the neutrality of time, place, and circumstance into a concern about content." H. Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 Sup. Ct. Rev. 1, 29.

The court then noted that the licensee itself had essentially conceded or "waived" its argument that editorial advertising was an unsatisfactory mode of speech in the broadcast forum.

> By opening up a forum for some paid presentations, independently edited and controlled by members of the public, the broadcasters have waived any argument that advertising is inherently disruptive of the proper function of their stations. The exclusion of only one sort of advertising—which we have shown to have great First Amendment value—is then highly suspect, a *prima facie* constitutional violation. To justify the exclusion, there must be a substantial factor distinguishing the disruptive effect of editorial advertising from that of commercial advertising.
>
> The content of the idea which the excluded speakers seek to promote is—emphatically—*not* permitted as a distinguishing factor in itself (App. 477).

This Court has recently applied the same analysis in a highly analogous case. *Police Dept. of City of Chicago* v. *Mosley,* ___ U.S.___ , 92 S. Ct. 2286 (1972), struck down an ordinance which permitted "peaceful picketing of any school involved in a labor dispute," but prohibited picketing or demonstrating for any other reasons on the streets and sidewalks within 150 feet of a school. *Id.* at 2288. Under both the Equal Protection Clause and the First Amendment, the Court observed that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or *more controversial views.*" *Id.* at 2290 (emphasis supplied). It may "not select which issues are worth discussing or debating in public facilities.... Once a forum is opened up to assembly or

speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone." *Ibid.*[33]

Here, too, the broadcast forum has been opened not merely to speech, but to commercial speech in an *editorial format.* Here, too, the use of that forum has been denied to those wishing to express "more controversial views" in the same format. Here, too, unconstitutional exclusions from a public forum have been "based on content alone."[34]

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[33] In the face of such clear constitutional doctrine, one can hardly take seriously the government's major argument that "[i]f, as in this case, a court decides in favor of such an affirmative regulatory policy solely in terms of what it divines from the First Amendment, then the Commission is ousted from its role of deciding how the public's interest in broadcasting can best be promoted and Congress is rendered powerless to change the court's result." (U.S. Br. at 34.) Agency (or indeed legislative) "policy" which promotes unconstitutional discrimination against speech cannot stand. That is the rationale and result of such cases as *Mosley* and *Cox.* v. *Louisiana, supra;* administrative and legislative "policy" preferring labor picketing to other controversial speech was summarily struck down.

[34] As both this Court, *Mosley, supra,* at 2290, 2291 & n.5, and the court below (App. 478) noted, regulatory discriminations between speech messages based on their content have been condemned without exception. See, e.g., *Fowler* v. *Rhode Island,* 345 U.S. 67 (1953); *Niemotko* v. *Maryland,* 340 U.S. 268 (1951). In the more typical case, a vague statute or ordinance has granted administrative officials excessively broad discretion to suppress selectively the speech of those they dislike. Statutes conveying such broad discretion have also been struck down. See, e.g., *Shuttlesworth* v. *Birmingham,* 394 U.S. 147 (1969); *Cox* v. *Louisiana, supra; Staub* v. *City of Baxley,* 355 U.S. 313 (1958); *Saia* v. *New York,* 334 U.S. 558 (1948).

The court below cited a consistent line of authority in striking down content-based discrimination against controversial advertising. Four federal courts and two state supreme courts have unanimously agreed that once a forum utilized for speech has been opened up for commercial advertising, a ban on "controversial" advertising is unconstitutional unless clearly justified by a "clear and present danger."[35] In the leading case, *Wirta* v. *Alameda-Contra Costa Transit Dist.*,[36] the California Supreme Court struck down a ban against the sale of advertising space in municipal buses for controversial causes. Characterizing the issue as one "in which a governmental agency has refused to accept an advertisement admittedly protected by the First Amendment for display in a forum which the agency has deemed suitable for the expression of ideas

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[35] *Lee* v. *Board of Regents of State Colleges*, 306 F. Supp. 1097 (1969), aff'd, 441 F.2d 1257 (1971) (school newspaper); *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969) (school newspaper); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967) (advertising in subway station); *Hillside Community Church, Inc.* v. *City of Tacoma*, 76 W. 63, 455 P. 2d 350 (1969) (advertising in municipal buses); *Wirta* v. *Alameda-Contra Costa Transit Dist.*, 434 P. 2d 982, 64 Cal. Rptr. 430, 68 Cal. 2d 51 (1967) (advertisements in municipal buses).

For similar cases involving other modes of speech in public forums, see, e.g., *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969) (armbands in public school); *Wolin* v. *Port Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1969) (leaflets in bus terminal); *Trujillo* v. *Love*, 322 F. Supp. 1266 (D.C. Colo. 1971) (state college newspaper); *Danskin* v. *San Diego Unified School Dist.*, 28 Cal. 2d 536, 171 P. 2d 885 (1946) (public school buildings); *People* v. *St. Clair*, 56 Misc. 2d 326, 288 N.Y.S.2d 388 (Crim. Ct. 1968) (public subway platform).

[36] 68 Cal. 2d 51, 434 P. 2d 982, 64 Cal. Rptr. 430 (1967). The *Wirta* decision was cited with approval by this Court in *Mosley*, *supra*, at 2291 n.5, and 2292.

through the medium of paid advertisements" (*Id.*, 434 P. 2d at 985), the court ruled:

> [D]efendants, having opened a forum for the expression of ideas by providing facilities for advertisements on its buses, cannot for reasons of administrative convenience decline to accept advertisements expressing opinions and beliefs within the ambit of First Amendment protection. *Id.*, 434 P. 2d at 985.

The court condemned as "a most pervasive form of censorship" a policy that "chooses between classes of ideas entitled to constitutional protection, sanctioning the expression of only those selected, and banning others." *Id.* at 986. Petitioners in the present case seeks to perpetuate an identical form of censorship. They cannot justify this censorship of non-commercial speech without a more "compelling" argument than mere "administrative convenience." See *Wirta, supra.*[37]

If any doubt remains that their policies are designed to implement a discriminatory scheme of unrestrained censorship, the broadcaster petitioners' own words quickly put them to rest. They all assure the Court

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[37] Petitioners seek to avoid this conclusion by arguing that their close supervision of the content of commercials prevents their "interests" in this speech from being outweighted by a countervailing need for *some* editorial speech. (U.S. Br. 51-52; ABC Br. 51-52; CBS Br. 41; WTOP Br. 45, 51.) This argument misses the point. Although licensees may indeed supervise the content of commercials to some extent, many are nonetheless broadcast. Commercial spokesmen for Dermasage Skin Lotion and Manischewitz Wines in fact *do* buy up to 18 minutes of WTOP's time each hour to speak to the merits of their products. If commercial advertisers can, under some circumstances, select the message, words, format, time of day, and audience for their message, then BEM should be given the same opportunity.

that controversial speech will flourish under their benevolent supervision.[38] Behind this benign facade, however, the broadcasters reveal their true colors.

ABC wants to reject controversial speech whenever its "content has either a marginal level of public interest or is in some respects offensive or inappropriate" (ABC Br. 13). It would exclude editorial announcements it considers "misleading, scandalous, indecent and 'crackpot' . . . inflammatory, hateful, 'frivolous' and . . . questionable" (ABC Br. 52, 53-54). CBS will reject controversial views that are "insignificant," "can be presented in some more effective fashion," are "trivial," "unduly inflammatory, offensive or otherwise unsuitable for broadcasting into the home" (CBS Br. 34, 40). NBC wishes to bar advertisements which stray "beyond the bounds of normally accepted taste," or address issues which have already been "adequately presented" (NBC Br. 10). And WTOP would protect the public from "propaganda campaigns" and subjects which are "slight, parochial or inappropriate" (WTOP Br. 31).

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[38] WTOP claims, for example, that under the fairness doctrine it will "select and balance subjects, formats, and speakers for the very purpose of assuring that a significant variety of different important issues and competing viewpoints are effectively presented" (WTOP Br. 22). ABC claims licensees have "the responsibility to choose . . . what issues should be covered, what manner of presentation is most appropriate and what spokesmen are best suited to present the various sides of such issues" (ABC Br. 44). CBS states that the "fairness doctrine requires broadcast licensees to cover significant public issues, and to present contrasting views on those issues" (CBS Br. 33). NBC suggests there is no evidence to prove "that the public has been denied access to the widest range of views as to controversial subjects" (NBC Br. 20).

Thus, the censorship issue is clearly posed. Petitioners would have this Court ratify a policy which permits broadcasters to censor from their airwaves all issues and spokesmen regarded by *them* as lacking sufficient public importance or merit to reach the ears and eyes of listeners and viewers. Yet such an approach is the antithesis of the word and spirit of the First Amendment. As noted by the court below, "the best judge of the importance of a particular viewpoint or issue is the individual or group holding the viewpoint and wishing to communicate it to others. In the First Amendment area, our best guarantee has always been a 'free market' in which partisans who feel strongly on particular issues may decide on their own to speak out and to speak out in their own way" (App. 469).

Flagrant discrimination against such partisan speech was properly held to violate the First Amendment.

B. THE TREATMENT OF "CONTROVERSIAL" ISSUES UNDER THE FAIRNESS DOCTRINE DOES NOT ELIMINATE UNCONSTITUTIONAL DISCRIMINATION AGAINST SELF-INITIATED AND SELF-CONTROLLED EDITORIAL SPEECH.

Petitioners fall back on an unusual argument apparently designed to paper over the obvious discrimination inherent in their flat ban on all "controversial" editorial speech. There is "no invidious discrimination" against controversial views, the Government contends, because the licensees *themselves* "devote substantial air time to . . . controversial issues of public importance" (U.S. Br. at 53). The existence of the fairness doctrine, moreover, is held up as the public's guarantee that broadcast licensees will cover all controversial issues "worthy" of coverage, will do so in a robust and vigorous manner, and in so doing will

obviate the need for any editorial advertising in the broadcast media.

There are two fundamental defects in this approach. First, it badly misconceives and underestimates the importance of direct, self-initiated and self-edited speech, especially in a broadcasting forum substantially controlled by a handful of governmental licensees. Second, it seriously overrates the ability of balanced journalistic coverage of certain issues to satisfy fully the public's right to receive "suitable access to social, political, esthetic, moral, and other ideas and experiences" on radio and television. *Red Lion, supra,* 395 U.S. at 390.

1. There is an important need for direct, self-initiated and self-edited individual speech in the broadcast media.

Although the First Amendment plainly protects "freedom of speech," petitioners argue, instead, that the First Amendment, as it applies to broadcasting, protects only the public's interest in *hearing* about certain issues.[39] In over 200 pages of briefs, petitioners nowhere address the basic First Amendment policy safeguarding freedom of *speech* by individuals or groups. By sleight of hand, they would convert the First Amendment into the following:

> Congress shall pass no law . . . abridging the right of the public to hear about issues.

Even had the founding fathers been foolish enough to adopt this formulation, no showing has been made that the interposition of a journalistic middleman between speakers and the listening public will guarantee the public full exposure to the "widest possible dis-

[39] See, e.g., ABC Br. 22-24; CBS Br. 22; WTOP Br. 19-24.

semination of information from diverse and antagonistic sources." *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945).

The genius of the First Amendment is that it has always defined what the public ought to hear by permitting speakers to say what they wish. Thus, it is no answer for petitioners to attempt to discriminate against speech by noting that the First Amendment protects the public's right to *"receive"* information. The crucial question is whether the government, through a process of "authoritative selection" of issues, speakers, and format, can define that right so narrowly as to foreclose speech initiated and controlled by individuals. This Court has repeatedly answered that question in the negative. It has found that the only way to assure adequate reception of views is to safeguard the right of individuals and groups to speak as freely as possible.[40]

For example, in stating that

> [t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' *Keyishian* v. *Board of Regents,* 385 U.S. 589, 603 (1967),

this Court was not engaged in idle rhetorical exercise. Rather, it stressed the constitutional importance of the

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[40]In *Marsh* v. *Alabama,* 326 U.S. 501, 505 (1946), this Court held that the "preservation of a free society is so far dependent on the right of each individual to receive such literature as he himself might desire that a municipality could not, without jeopardizing that vital individual freedom prohibit door to door solicitation of literature. *Martin* v. *Struthers,* 319 U.S. 141, 146, 147."

mode of speech to assure that debate on public issues will be "uninhibited, robust, and wide-open". *New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 270. The First Amendment, then, is served by opening up forums to individual speakers as much as is possible. Its emphasis lies with reducing the power of those few individuals or corporations whose actions or policies *decrease* the diversity of the marketplace. In Justice Jackson's view:

> The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us. *Thomas* v. *Collins,* 323 U.S. 516, 545 (1945) (concurring opinion).

Basic First Amendment principles are not compatible with the suggestion that broadcast licensees should function as authoritative middlemen, picking and choosing which ideas they think the public should hear, and rejecting those it should not.

Moreover, the First Amendment's wisdom in unequivocally protecting *speech* safeguards the vital interest in assuring "self-fulfillment [of expression] for each individual," *Mosley, supra,* —, U.S. at —, 92 S. Ct. at 2290.[41] "[S]peech concerning public affairs is

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[41] *Amicus* NBC, the licensee of many broadcast stations, manifests a disquieting hostility to the individual's liberty of free speech: "Whatever may be the psychotherapeutic rewards of self-fulfillment, they have little to do with the First Amendment. The core purpose of the First Amendment, after all, is not that of soothing the ruffled ego of a speaker unable to find a forum to his liking." (NBC Br. at 18.)

more than self-expression." *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964).

The court below thus correctly disposed of petitioners' arguments by finding that "[i]t is too late to argue that the First Amendment protects ideas but not an individual's interest in expressing them and doing so in his own way" (App. 467-468).

This Court has specifically recognized that the advertising mode is an important vehicle for First Amendment speech. In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), the Court set aside a libel judgment against a newspaper resulting from an editorial advertisement it had printed, stating:

> Any other conclusion would discourage newspapers from carrying 'editorial advertisements' of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise *their freedom of speech* even though they are not members of the press. . . . [Citations omitted.] The effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.' [42]

BEM lacks ownership or control of the press or of broadcast facilities. Editorial advertisements there-

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[42] *New York Times, supra*, at 266 (emphasis supplied). Mr. Justice Brennan recently expanded this point in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), stating:

> It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. Constitutional adjudication must take into account the *individual's* interest in access to the press. . . . 403 U.S. at 47 n.15 (emphasis supplied).

fore offer it a unique opportunity to communicate its message to a mass audience. Moreover, as opportunities for self-expression increase, the diversity of views available to the public will correspondingly grow.

In many respects, the advertising mode of speech is unique. Unlike all other opportunities for public speech through the mass media, advertising allows the individual to choose his own topic, pick the timing of his message, initiate debate on a particular topic, and most importantly, exercise complete creative control over the content of his statement. The choice of spokesman, script, photography, lighting, setting, on-camera talent, even sound effects are the "crucial controls" (App. 468) placed in the speaker's hands. Its concentrated form, its capacity for repetition, and its impact on the listener make editorial advertising "a special and separate mode of expression, not simply a duplication of other expression on the same medium" (App. 468-69).[43]

Two recent cases have prohibited school newspapers from restricting "editorial" expression to their news or letters-to-the-editor columns. *Lee* v. *Board of Regents of State Colleges,* 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd,* 441 F. 2d 1257 (7th Cir. 1971), and *Zucker* v. *Panitz,* 299 F. Supp. 102 (S.D.N.Y. 1969).

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[43] Peter Drucker, the noted sociologists, has observed: "Few messages are as carefully designed and as clearly communicated as the 30-second television commercials . . . . Few teachers spend in their entire teaching careers as much time or thought on preparing their classes as is invested in the many months of writing, drawing, acting, filming, and editing one 30-second commercial . . . . [I]t conveys accessible information, clear image, and perfect comprehension. It is . . . perfect 'learning' in its methodology . . . ." P. Drucker, *The Age of Discontinuity* 336-37 (1970).

In both cases, the courts emphasized the unique importance of the advertising mode:

> It is readily apparent that a paid advertisement can be cast in such form as to command much greater attention than a letter to the editor Large type, photographs, repeated publication and full pages of space are some of the modes of expression available in an editorial announcement that might not be available in a letter to the editor. *Lee, supra,* 306 F. Supp. at 1101.

This makes clear that relegating all controversial speech to journalistic coverage hardly comports with the free speech interests inherent in editorial advertising.

WTOP's flat ban on the sale of time for controversial editorial speech contrasts dramatically with the speech opportunities it affords its paying customers. WTOP turns over 30 percent of all its airtime, or 18 minutes every hour, to commercial sponsors who pay for the opportunity to broadcast their message in their own way.[44] WTOP markets this airtime like the vendor of any other commercial product.[45] Its customers include airlines, coffee, banks, wine, cookies, skin lotion, gasoline, batteries, and a host of other goods and services.[46] In many instances the sponsor prepares his message on record or tape in advance and merely supplies it to WTOP. Sophisticated sound equipment and other creative devices can thus be used

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[44] See Appendix A, *infra.*

[45] One expert has observed: "[T]he communications industries . . . consist of commercial enterprises, not public service institutions . . . . They sell advertising in one form or another, and they bait it principally with entertainment. Only incidentally do they collect and disseminate political intelligence." V.O. Key, *Public Opinion and American Democracy,* 378-79 (1961).

[46] See Appendix A, *infra.*

at the sponsor's leisure. Whereas a soapbox orator or pamphleteer can at best reach hundreds during an hour, stations like WTOP can reach hundreds of thousands of listeners spread across an entire metropolitan area within a few minutes.[47] It is for precisely this reason that BEM selected WTOP as the appropriate medium through which to convey its views on the war issue. Ironically, the importance and controversiality of its message were the sole features that denied BEM's speech access to WTOP's forum.

The almost total monopolization of paid editorial time by commercial advertising is strikingly perverse. Although the First Amendment generally protects "political" speech but not "commercial" speech,[48] the Commission and its licensees permit commercial salesmen to speak about the merits of their own goods—yet deny a comparable opportunity to persons wishing to speak on the burning issues of the day.[49]

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[47] WTOP's own promotional literature stresses the importance of the forum it offers. According to WTOP, "no other medium can react to changing events . . . ." (Appendix B, *infra*, at p. 4.) Its audience is "sophisticated about news reporting" (*Id.* at p. 5), and "[m]ore members of Congress regularly listen to WTOP than to any other radio station." (*Id.* at p. 7.) WTOP concludes: "WTOP non-stop news is not soothing syrup. Listeners deliberately *select* it on their dials, deliberately listen to it, react to it, become *involved* with it." (*Id.* at p. 13.) It was for these reasons that BEM sought to purchase editorial time from WTOP.

[48] See, e.g., *Breard* v. *Alexandria*, 341 U.S. 622 (1951); *Valentine* v. *Chrestensen*, 316 U.S. 52, 54 (1942); *Pollak* v. *Public Util. Comm'n.* 191 F.2d 450, 456-57 (D.C. Cir. 1951), *rev'd on other grounds*, 343 U.S. 451 (1952); See generally Note, *Freedom of Expression in a Commercial Context*, 78 Harv. L. Rev. 1191 (1965); Kalven, *The New York Times Case: A Note on 'The Central Meaning of the First Amendment,'* 1964 Sup. Ct. Rev. 191, 208-09.

[49] Surprisingly, the Commission makes an exception for spot announcements by major political parties designed to raise money —a close parallel to commercial advertising (App. 269-273).

Having examined these factors, the court below concluded that the vehicle of editorial advertising was unusually powerful and thus particularly appropriate for individual speech (App. 468-74). On the other hand, the *licensee's* interest in this time is not strong (App. 465). The advertising time sold by WTOP and other licensees, in an important sense, was relinquished to others for *their* direct and substantially unedited[50] speech. The sponsor does not ask the licensee to speak *for* him, as speakers with controversial messages must do under the fairness doctrine. He controls the entire message himself. In the allocation of advertising time, therefore, "the broadcasters have no such strong First Amendment interests. *Their* speech is not at issue; rather, all that is at issue is their decision as to which other parties will be given an opportunity to speak" (App. 465).[51]

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[50] Stations can, of course, edit or reject advertisements that are false and misleading, although the Commission will not normally review a station's judgment "whether particular broadcast advertisements are false and misleading," *Consumers Ass'n of District of Columbia*, 32 F.C.C. 2d 400, 405 (1971), and asks licensees only to make their own "good faith" "reasonable" judgments in this area. *Id.* at 407. Licensees may also reject advertisements they consider in "poor taste," although even this criterion is flexible. See P. Dougherty, *Advertising: TV Will End a Ban*, N.Y. Times, June 29, 1972, p. 66 (advertising of "sanitary napkin, tampon and douche products" will start on stations subscribing to the NAB Advertising Code).

[51] *See Capital Broadcasting Co.* v. *Mitchell*, 333 F.Supp. 582 (D.C.D.C. 1971), *aff'd per curiam*, 40 U.S.L. Week—(U.S., Mar. 28, 1972), in which the court of appeals concluded that the Congressional ban on cigarette advertising had "no substantial effect on the exercise of petitioners' [licensees'] First Amendment rights . . . . [P]etitioners, themselves, have lost no right to speak—they have only lost an ability to collect revenue from others for broadcasting their commercial messages. See, *Business Executives' Move for Vietnam Peace* v. *F.C.C.*, 450 F.2d 642 at 654 (D.C. Cir. 1971)

The Commission and its licensees have created a policy for allocating advertising time which systematically discriminates against "controversial" speech. Confronted with an unbroken chain of precedents striking down precisely such forms of discrimination, they argue that the allegedly comprehensive programming of the broadcast licensees is somehow sufficient to eliminate the discrimination. The argument quite obviously fails. The use of the advertising format and mode is a unique and important vehicle for First Amendment rights. It has been developed and perfected by commercial interests over the years, and acknowledged by them to constitute a highly effective mode of communication. Absent a "compelling" justification, the Commission and its licensees cannot deprive BEM and other small organizations of at least some opportunity to *pay* for the privilege of editorial speech through the media.

2. The fairness doctrine is not a sufficient substitute for editorial expression

The Government argues that the fairness doctrine requires broadcasters to "devote substantial air time to fair and balanced presentation of controversial

.... [The Act] does not prohibit them from disseminating information about cigarettes, and, therefore, does not conflict with the exercise of their First Amendment rights." *Id.* at 584.

The Commissions's rules even permit licensees to sell entire blocks of time to "time brokers" who, in turn, re-sell the time to individual advertisers. See 47 C.F.R. § 1.613 (c) (1972). At least one station has "brokered" 15 out of its 32 weekly hours to an outside programmer, thereby relinquishing control of more than 50% of its time. *Metropolitan Broadcasting Co.*, 8 F.C.C. 557 (1941). See also 47 C.F.R. § 1.613(e) (1964) (sales of bulk time up to four hours a day). Presumably such stations could also argue, along with petitioners, that they could legitimately relinquish control over their facilities only to those who eschew "controversial" programming.

issues of public importance" (U.S. Br. 53). However, sole reliance upon the broadcaster's journalistic judgment as to which controversial issues and views shall reach the air is, on its face, inconsistent with the First Amendment values of diversity outlined above. The broadcaster is given total power to determine what the public hears, using his own "good sense" to select "subjects," "format," "different shades of opinion to be presented," and "spokesmen for each point of view." He will determine whether a given subject is "worth considering" and, even if so, whether it has already received "sufficient" broadcast time. *Report on Editorializing,* 13 F.C.C. at 1251-1252; See also U.S. Br. at 47-48.

"Authoritative selection" is thus the synonym of the licensee's "journalistic" judgment. Speech by others may be permitted, but only on the broadcaster's terms. If his speech is rejected, the editorial speaker has no recourse outside of the fairness doctrine to achieve redress. And application of the fairness doctrine itself may not assure him an opportunity to speak since the licensee may decide that someone else is the "more appropriate spokesman for the particular point of view" (U.S. Br. 47) or ban the view entirely.

As discussed *supra* (pp. 25-33), reliance on fairness alone is basically at odds with the concept of self initiated speech enshrined in the First Amendment. Instead of "robust, wide-open debate" among speakers on controversial issues, the listener or viewer receives the broadcaster's simulation of a debate, in which he has chosen the speakers, the format, the timing and the content. The journalist-broadcaster necessarily acts from his own perspective, with his own

peculiar biases, and in response to pressures from both advertisers and his audience. In short, he can hardly be the perfect censor of what the public ought to hear.

Apart from theory, broadcast journalism has not, in recent years, met with uniform praise. Judge Tamm, for example, concurring in *Hale* v. *F.C.C.*, 425 F.2d 566, 574 (D.C. Cir. 1970), citing *Violence and the Media* [A Staff Report to the National Commission on the Causes and Prevention of Violence] 81-82 (1969), observed:

> The commonsense suspicion that this creeping growth of media cartels and conglomerates is likely to produce even more bland and homogeneous intellectual fare than that which is currently available on the mass media was recently confirmed by a study which found that "[t]o limit audience alienation, large circulation media prefer to report ideas of factual stories that are either inoffensive or on which there is relatively broad agreement or wide acceptance."

And the *Report of the National Commission on Civil Disorders,* Ch. XV, pp. 210-211 (1968) stated that the mass media

> have not communicated to the majority of their audience—which is white—a sense of the degradation, misery and hopelessness of living in the ghetto. They have not communicated to whites a feeling for the difficulties and frustrations of being a Negro in the United States. They have not shown understanding or appreciation of—and thus have not communicated—a sense of Negro culture, thought, or history. . . . We believe that most news organizations do not have direct access to diversified news sources in the ghetto. Seldom do they have a total sense of what is going on there.

It is not necessary to condemn broadcast journalism in categorical terms to illustrate the deficiencies inherent in relying *solely* upon it as the determinant of those views and voices the public can hear and those it cannot. Although broadcasters often perform commendable journalistic service, they, like most of us, are not omniscient. The "ghetto" is just one part of society to which they do not have full access, and this alone indicates why persons and public groups must, if at all possible, have some right of access to the broadcaster's airwaves and audience.

Although the fairness doctrine specifically requires licensees to seek out and cover issues of controversy and public importance, *United Broadcasting Co. (WHKC)*, 10 F.C.C. 515 (1945); see *Red Lion, supra,* 395 U.S. at 377, the Commission has never revoked a license for excessively bland or non-controversial programming. In part because such a standard is inherently difficult to enforce,[52] the Commission essentially lacks the tools necessary to supervise a licensee's performance under the fairness doctrine. Left the discretion to eschew controversy, therefore, many licensees have done so with a vengeance.[53] Offers to purchase

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[52] As the court below noted, "the obligation to give 'full' coverage to controversial issues" is "inherently difficult to define and enforce. At best, the Commission can evaluate only the *general* willingness of a licensee to 'seek out' issues and glaring examples of noncoverage of obviously important issues. The Commission cannot be expected to engage licensees in fine debates over coverage of less obviously life-or-death issues" (App. 470).

[53] "Broadcasters, both individually and in concert have traditionally avoided controversial programming because sponsors are hesitant to become even subliminally associated with opinions disagreeable to potential purchasers." Note, 54 Cornell L. Rev. 294, 296 (1969). One DuPont advertising executive has commented:

spot advertising time have been rejected.[54] Attempts to secure free and paid air time have regularly been rejected, guests "blipped off" interview shows, and controversial subjects otherwise "avoided."[55]

"All these critics forget the point of the TV show—to bring in extra customers. If you alienate one prospective customer with your TV show, it's a flaw commercially no matter how successful it is artistically." S. Opotowsky, *TV: The Big Picture*, 84 (1961). See also, Note, *The Wasteland Revisited*, 17 U.C.L.A. L. Rev. 868, 879 (1970); E. Barnouw, *A Tower in Babel* (1966), and *The Golden Web* (1968); F. Friendly, *Due To Circumstances Beyond Our Control*, 92 (1966); N. Johnson, *How to Talk Back to your Television Set*, 81-96 (1970); and H. Mehling, *The Great Time-Killer*, 42 (1962).

[54] Recently, the three television networks refused to sell time to Allstate Insurance for spot advertising demonstrating the effectiveness of the air bag auto safety device. Several networks felt the commercial was "controversial," would require them to present the other side under the fairness doctrine, and refused to sell the time, even after Allstate agreed, if necessary, to pay for the presentation of contrasting viewpoints. *Broadcasting Magazine*, July 31, 1972, p. 24; "Allstate Says 3 TV Networks Refused to Show Commercial Praising Air-Bag," *New York Times*, July 26, 1972, p. 61.

[55] NBC and CBS have refused to sell spot announcement time to a labor union seeking to communicate its views on a labor settlement to its millions of members. *Communications Workers of America*, 31 F.C.C. 2d 841 (1971). WTOP, in fact, cites this precedent as an example of the need to bar "slight, parochial, or inappropriate" views from air time, and concludes that such "demands" for air time do not "foster confidence in a laissez-faire approach to broadcast programming" (WTOP Br. 31). A Florida station also refused to sell time to a labor union to explain its views on a pending strike. *Amalgamated Meat Cutters*, 25 F.C.C. 2d 279 (1970); see *Retail Store Employees Union, Local 880* v. *F.C.C.*, 436 F. 2d 248 D.C. Cir. 1970) (refusal to sell time reversed). The three networks and WTOP-TV refused to sell time for a documentary opposing the admission of mainland China to the United Nations. *Committee of One Million*, 33 F.C.C. 2d 545 (1971). Congress' Commission on

Exclusive reliance upon broadcasters' journalistic wisdom will not, has not and cannot assure that the public will be exposed to the "widest possible dissemination of information from diverse and antagonistic sources", *Associated Press* v. *United States, supra,*

Population Growth sought to purchase network time to discuss the population explosion and was turned down. *Washington Post,* Feb. 2, 1972, p. A-4. Common Cause was not allowed to purchase network time for a program rebutting the Administration's views on Vietnam. *Washington Post,* Style Section, May 20, 1971. On May 26 and June 15, 1970, a group of 14 U.S. Senators was denied the right to purchase network time to reply to the President on the Vietnam War. *Committee for the Fair Broadcasting of Controversial Issues,* 25 F.C.C. 2d 283, 286 (1970). Consumer-oriented "public service announcements" urging Chevrolet owners to effect repairs on defective engine mounts were rejected for network broadcast. The networks also refused to broadcast announcements disputing the claims of analgesic advertisements. *Broadcasting Magazine,* July 24, 1972, p.19. The networks have refused to permit 13 U.S. Congressmen to air a self-produced documentary on racial problems. *Washington Post,* Feb. 3, 1971, p. A-3. The host on NBC's "Today Show" terminated an interview with George Jessel when he sardonically described two leading newspapers as "Pravda." *George Jessel,* 31 F.C.C. 2d 847, 850 (1971). Commissioner Nicholas Johnson's criticisms of drug advertising on CBS' "Merv Griffin Show" were deleted prior to broadcast. *N. Y. Times,* Sept. 3, 1971, p. 47. ABC refused to broadcast a college football half-time program attacking "war, racism, and pollution" because it had "definite political implications." *Variety,* Nov. 18, 1970, p. 50. Radio station KCBS in San Francisco terminated President Nixon's "Anaheim" address on violence when it concluded the speech was "political." CBS blanked out its television picture of Abbie Hoffman on the "Merv Griffin Show" when he appeared in a "flag shirt" in order "to avoid affronting" viewers. *N. Y. Times,* Mar. 29, 1970, p. 65. ABC deleted the comments of a folk singer on the "Dick Cavett Show" when she criticized the conduct of the "Chicago Conspiracy Trial." *Conq. Richard L. Ottinger,* 18 P & F Radio Reg. 2d 1031, 1036 (1970). CBS blipped out remarks made on the "Tonight Show" by a guest critical of one of CBS' TV affiliates. *N. Y. Times,* Mar. 14, 1969. A television station in Hartford deleted portions of a talkshow guests's comments on the ground that they

326 U.S. at 20. Broadcaster decisions as to which issues or views are "trivial" or "unduly inflammatory, offensive or otherwise unsuitable for broadcasting" (CBS Br. at 40) or "slight, parochial or inappropriate" (WTOP Br. at 31) will inevitably filter out of the marketplace of ideas many attempts to speak before the public will have the opportunity to judge the merits.[56] Yet if the public never hears those views, it, as well as the would-be-editorial speaker, suffers irreparable loss.

A right of *some* direct editorial speech in the broadcase media can significantly ameliorate these problems in several regards. New issues will be brought to public attention and the level of controversy surrounding them may increase or become more focused. Dissident voices on issues already aired will be heard, often adding new dimensions to the public debate. And the unique views of each speaker will be accurately communicated because he will be able to identify himself, speak in his own words and format, and exercise con-

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violated the station's ban on "astrological" material. *Ms. Alexandra Mark*, F.C.C. 72-278 (Mar. 23, 1972). A Los Angeles TV station blipped out the words of writer Mark Lane when he made specific allegations concerning war crimes, *Mark Lane*, F.C.C. 72-6594 (July 19, 1972). WTOP's sister station in Jacksonville, Florida, WJXT-TV, reportedly fired a newsman because he caused advertising account cancellations. *The Nation*, Nov. 9, 1970, p. 455. A newsman was fired from a Pennsylvania station, reportedly because he named local stores (which were also station sponsors) that were violating the price-freeze guidelines. *Evening Star*, Dec. 27, 1971, p. A-9.

[56] Cf., *Saia* v. *New York*, 334 U.S. 558, 559 (1948), which struck down on First Amendment grounds an ordinance forbidding the use of sound amplifiers except for "public dissemination . . . of items of news and matters of public concern . . . provided that the same be done under permission obtained from the Chief of Police."

trol over the timing and context of his message. In short, broadcasting will more closely resemble a forum in which "robust, wide-open debate" can take place. Members of the public will not be forced to rely solely on licensee's broad discretion, hoping that the licensee will present their views, and not ignore or reject them as "slight, parochial or inappropriate" (WTOP Br. 31). To paraphrase the Court in *Tinker* v. *Des Moines School Dist.*, citizens in our system

> . . . may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are *officially approved* . . . [They are entitled to] freedom of expression of their own views. 393 U.S. at 511 (emphasis supplied.)

The limited access opportunity for editorial speech mandated by the court below will expose listeners to more than "officially approved" views.

II. THE FAIRNESS DOCTRINE WAS DESIGNED AS A SUPPLEMENT TO, NOT A SUBSTITUTE FOR, SELF-INITIATED EDITORIAL SPEECH.

Petitioners argue at some length, not only that the fairness doctrine exhausts the need for individualized speech in the broadcast media, but that Congress intended the fairness doctrine to preempt editorial speech altogether. The Government goes so far as to argue that the free speech rights of individual citizens vis-a-vis the broadcast media require Commission recognition and *enforcement* before they can come into existence, and require implementive "policy" decisions which the courts should allow the Commission to make. (U.S. Br. 31, 45.)

Whatever force these arguments might muster in cases not involving unconstitutional discrimination against "controversial" speech, they derive no support from the fragments of legislative history and fairness rulings selectively culled by petitioners. The Congress has never clearly stated its intentions concerning access of editorial speech to the broadcast media. However, to the extent conclusions are justifiable, direct editorial speech has long been an integral component of the "public interest" based broadcast scheme. Indeed, it can be said with some force that the fairness doctrine itself was forged in a series of decisions that struck down attempts by licensees to exclude editorial speech.[57]

Prior to 1927, "[t]he allocation of frequencies was left entirely to the private sector, and the result was chaos." *Red Lion, supra,* at 375. Ruinous interference, poor technical quality and overlapping frequencies forced the broadcast industry to call for government intervention. In 1927 Congress enacted the Radio Act of 1926, 44 Stat. 1162, and in 1934 transferred many of its provisions to Title III of the Communications Act of 1934, Stat. 1064, as amended, 47 U.S.C. § 151 *et. seq.* (1964) (hereinafter "the Act").

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[57] We should note, that even were this not the case, an unconstitutional discrimination against controversial speech could not be justified on the ground that Congress or a governmental agency desired it. *See Mosley, supra; Cox* v. *Louisiana, supra.*

In addition, the government cannot point to the Commission's pending *Inquiry* (pp. 9-10, *supra*) as a basis for this Court avoiding the constitutional issue at hand (see U.S. Br. at 60). Not only would that constitute an unsound approach to constitutional litigation, but the Commission has specifically excluded from its rulemaking the constitutional issue before the Court. See *Order and Further Notice of Inquiry, supra,* 33 F.C.C. 2d at 798-799, quoted *supra,* at p. 10.

The government retained ownership of the airwaves (47 U.S.C. § 301). Broadcast licenses would be granted, and renewed, only where the licensee's programming served the "public interest, convenience, and necessity." See 47 U.S.C. §§ 307(a), 309(a), 310(b) (1964). The Act sought to "secure the maximum benefits of radio to all the people of the United States." *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 217 (1943).

Congress very early realized that a broadcast licensee's exclusive three-year franchise conferred considerable power to propagandize the licensee's own views and exclude others.[58] The Act was therefore designed to reduce the danger that "in the absence of governmental control, the public interest might be subordinated to monopolistic domination in the broadcasting field." *F.C.C.* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 137 (1940).

The early regulatory steps taken by the Commission, therefore, were designed to *limit,* not increase, the licensee's power to exclude the views of others.

The Commission took its first administrative step toward the "fairness doctrine" in *Great Lakes Broadcasting Co.* v. *Federal Radio Commission,* 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on other grounds,* 37 F.2d 993 (D.C. Cir. 1930), cert. dismissed, 281 U.S. 706

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[58] During the debates over the future of radio regulation, Secretary of Commerce (and later President) Herbert Hoover warned that there must be "something more than naked commercial selfishness" in broadcasting. Fourth National Radio Conference 7-8 (Nov. 9, 1925), quoted in J. Coons, *Freedom and Responsibility in Broadcasting,* 96 (1961). Congressman White, the floor manager of the 1927 Radio Act, explained it was intended to ensure that "the broadcasting privilege will not be a right of selfishness" but would instead "rest upon an assurance of public interest to be served." 67 Cong. Rec. 5479 (1926). Congressman White repeated in 1934, "The right to broadcast is to be based . . . not upon the selfish desire of the individual." 68 Cong. Rec. 2579 (1934).

(1930).[59] It ruled that the "public interest requires ample play for the free and fair competition of opposing views" in porgramming addressed to "public questions." *Great Lakes, supra,* at 33. The Commission did not expressly address the question whether these "opposing views" could be presented through *paid* editorial announcements or programming. It did suggest, however, that "opposing views" would be presented by individual speakers over the licensee's airwaves:

> [P]articular doctrines, creeds, and beliefs must find their way into the market of ideas by the existing public-service stations, and if they are of sufficient importance to the listening public *the microphone will undoubtedly be available.* If it is not, a well-founded complaint will receive the careful consideration of the Commission. *Great Lakes, supra,* at 34 (emphasis supplied.)

It was not clear that *advertising* space was used to express editorial opinions.[60] Advertising itself was held

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[59] At the time of the *Great Lakes* decision, stations had various ways of meeting their public interest obligations. "Propaganda stations" broadcast principally religious or other special interest programs. "General public-service stations" presented "well-rounded" entertainment and public affairs programming. *Great Lakes,* at 34. Some purchased prepared programs; others produced their own and sold their sponsorship to commercial concerns. Spot advertisements were used, but comprised less than half of all advertising time.

[60] At the time of the Radio Act of 1927, "[r] adio advertising was . . . mentioned as an almost peripheral topic. At this juncture the time-selling stations were still in a minority . . . ." E. Barnouw, *A History of Broadcasting in the United States: A Tower in Babel,* Vol. 1, p. 200 (1966). The predominant form of advertising was sponsored shows, in which the advertiser merely identified his name with the program. *Id.* at 158, 237. In 1928 the President of NBC told a Senate Committee that it clients neither described products nor named prices over the air, but relied instead on "good will" from identifying their name with popular programs. Id. at 237. By 1932, however, spot advertisements comprised 40 per cent of all radio advertising. *Id.* at 239.

in generally low regard, and stations occasionally jeopardized their licensees merely by broadcasting "direct" advertisements mentioning *price*. See generally, *Head* v. *New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 433 (1963) (Brennan, J., concurring).

In *United Broadcasting Co.*, (WHKC), 10 F.C.C 515 (1945), the Commission significantly expanded the *Great Lakes* doctrine. There, a labor union challenged a station's license renewal because of its "policy not to permit the *sale* of time for *programs* which solicit memberships, discuss controversial subjects, race, religion, and politics" was "throttling free speech" and violating "the public interest."[61] *Id.* at 516. Following a hearing, the licensee offered the following policy statement for Commission approval:

> Station WHKC will make time available, primarily on a sustaining basis, but also on a commercial basis, for the full and free discussion of issues of public importance, including controversial issues, and dramatizations thereof, in order that broadcasting may achieve its full possibilities as a significant medium for the dissemination of news, ideas, and opinions. And, in doing so, *there will be no discrimination* between business concerns and nonprofit organizations either in making time available or restricting the use of such time. Nonprofit organizations will have the right to

[61] The station had patterned its policy after the provisions of the Code of the National Association of Broadcasters, which provided that "no time shall be sold for the presentation of public controversial issues . . . and that solicitation of memberships in organizations, whether on paid or free time, should not be permitted except for charitable organizations . . . ." *United Broadcasting, supra*, at 516. WHKC's policy was remarkably similar to WTOP's policy in the instant case, *supra* at p. 3.

> purchase time for solicitation of memberships. *United Broadcasting, supra,* at 517. (Emphasis supplied.)

The Commission accepted the revised policy as "fair and *nondiscriminatory*" (*Id.* at 518, emphasis added). Stating that the "Communications Act of 1934 requires radio to be an instrument of free speech," the Commission held that licensees had a "duty . . . to maintain an overall program balance by providing time on a nondiscriminatory basis for discussion of public controversial issues. . . ." The contrary view would "impose the views of the licensee upon the material to be broadcast." [62] *United Broadcasting, supra,* at 517, 518.

The Commission reaffirmed its position the following year. In *Robert Harold Scott,* 11 F.C.C. 372 (1946), a petitioner complained that local stations had attacked "atheism" yet "refused to make any time available to him, by *sale* or otherwise," for presentation of opposing views. Once again, the Commission strongly rejected the licensee's

> . . . rigid policy that time shall be denied for the presentation of views which may have a high degree of unpopularity. The criterion of the public interest in the field of broadcasting clearly precludes a policy of making radio *wholly unavailable* as a medium for the expression of any view which falls within the scope of the constitutional guarantee of freedom of speech. *Robert Harold Scott, supra* at 374, 376 (emphasis supplied).

[62] Two points are worth noting. First, the WHKC policy appears concerned primarily with programming, not advertising time. Second, the Commission was eager to avoid a situation in which the licensee could "impose" his views on the material supplied by outside speakers.

In *Homer P. Rainey,* 11 F.C.C. 898 (1947), the Commission reiterated its nondiscrimination rationale. The broadcasters had limited the time available for sale to political candidates "as a means of maintaining proper program balance." *Id.* at 903. Even though the stations had made *some* time available for sale, the Commission struck down their exclusionary policy as arbitrarily narrow.[63]

In its *United Broadcasting, Scott* and *Rainey* decisions, the Commission was confronted with station policies barring the sale of time for outside presentations on "public" and "controversial" issues. In each case the Commission struck the policy down, rejecting policies of discrimination against editorial speech. Rejecting the idea that First Amendment speech protections were "narrow legalistic concepts," *Scott, supra* at 374, the Commission posited its actions on a need for individual self-expression through the media:

> [F]reedom of speech means freedom to express disbeliefs as well as beliefs. . . . [*F*]*reedom of speech can be as effectively denied by denying access to the public means of making expression effective—whether public streets, parks, meeting halls, or the radio—as by legal restraints or punishment of the speaker. Robert Harold Scott, supra* at 374 (emphasis supplied).

In each decision the Commission "required" licensees to effectuate the basic purpose of what was subsequently called the "fairness doctrine" by allowing *individuals* to acquire broadcast time for controversial speech.

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[63] "Obviously, it would not be in the public interest for the licensee of any radio station . . . to arbitrarily deny or restrict the right of any person to discuss a public controversial issue (*United Broadcasting Co.* (WHKC), Docket No. 6631)." *Homer P. Rainey, supra* at 903.

In 1949 the Commission formalized its earlier decisions into a single document. *Editorializing by Broadcast Licensees,* 13 F.C.C. 1246 (1949). Contrary to the Government's contentions, however, the Commission did not repudiate its leading decisions of the previous three years.[64] Quite the opposite, it strongly reaffirmed the need for individualized broadcast speech.

The *Editorializing Report* addressed two narrow issues: could licensees broadcast their own editorials, and if so, what provisions should be made to safeguard "fair and equal presentation of all sides of controversial issues." *Id.* at 1246. It did not address editorial speech by individuals. Nevertheless, the Commission reiterated "the inevitability that there must be some choosing between *various claimants for access to a licensee's microphone,*" *Id.* at 1248 (emphasis supplied), and affirmed the nondiscrimination "duty" announced in *United Broadcasting* and *Scott. Id.* at 1249.

The Commission thus rejected a suggestion that the licensee's public interest obligation could be met

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[64] See U.S. Br. at 47: "But as the Fairness Doctrine developed, the Commission found that it was not necessarily required, as dicta in *United Broadcasting* had indicated, that broadcasters *sell* time to private individuals so long as the broadcaster used his facilities as a forum for discussion of public issues."

In fact, the genesis of the Commission's fairness doctrine has even been attributed to these leading decisions. This Court cited *United Broadcasting Co.* as the Commission precedent requiring broadcasters to "give adequate coverage to public issues." *Red Lion, supra* at 377. The Commission itself cited *United Broadcasting* and *Scott* in its first formal definition of the fairness doctrine. See *Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, 1249-50 (1949).

"*merely* through the adoption of a general policy of not refusing to broadcast opposing views where a demand is made of the station for broadcast time." *Editorializing Report,* at 1251 (emphasis added). The Commission concluded that *more* (not less) was required:

> If . . . the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them, it is evident that broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities, *over and beyond their obligation to make available on demand opportunities for the expression of opposing views. Editorializing Report,* at 1251 (emphasis supplied).

The fairness doctrine was thus developed to restrain, not increase, the power of licensees "to exclude the expression of opinions and ideas with which they are in disagreement." *Editorializing Report,* at 1256. Its seminal precedents struck down bans on the purchase of time for "controversial" views. In most cases, editorially controlled speech was apparently sought for programming, and not advertising, time. Advertising was, quite literally, a "free-fire zone, largely ungoverned by regulatory guidelines" (App. 448). It follows *a fortiori,* however, that if editorial access to programming time is required under certain circumstances, then the same would hold true of advertising time.

Nothing in the 1949 Report, the 1959 Amendments to § 315 of the Communications Act, nor *Red Lion* suggests that the fairness doctrine is a substitute for the

direct expression of individual views. Rather, while *Red Lion* did not directly consider the question of editorial speech for outsiders, the Court rejected the licensees' contentions that the First Amendment "protects their desire to use their alloted frequencies . . . to exclude whomever they choose from ever using that frequency," 395 U.S. at 396. The fairness doctrine is therefore neither inconsistent with, nor a blanket substitute for, "the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views." *Red Lion,* 395 U.S. at 400.

III THE FUNCTIONING OF THE REGULATORY SCHEME WILL NOT BE IMPAIRED BY THE NONDISCRIMINATORY SALE OF TIME FOR EDITORIAL ADVERTISEMENTS.

The petitioners advance a number of arguments why discrimination against controversial editorial speech in the sale of advertising time can be tolerated. They strenuously urge that the wealthy and/or proponents of causes able to attract financial support will have an exaggerated influence in setting the agenda of debate on the air. They might buy up all the paid editorial time to promulgate their own views. Then it is argued, the broadcasters' determination of topics to be covered on their own programs can not be made solely on the basis of newsworthiness, journalistic merit and what they regard as most likely to contribute to an informed public. Rather, they will be required to program partially on the basis of the fairness doctrine's requirement that they air viewpoints opposing those presented in paid editorial ads. ABC Br. at 45-48; CBS Br. at 40-43; WTOP Br. at 20-30. "Money alone would determine what issues are to be aired, and in what format" (App. 490) in contravention of this Court's dis-

dain for a system where only the "highest bidder" obtains available time. *Red Lion, supra,* 395 U.S. at 392.

Moreover, under the doctrine of *Cullman Broadcasting Co.,* 40 F.C.C. 576 (1963), if there is no speaker willing to pay to present contrasting viewpoints, licensees may be required to present opposing views at their own expense. And petitioners finally argue that a nondiscrimination requirement will turn licensees into "common carriers," in violation § 3(h) of the Act. Rules to resolve these problems, petitioners argue, cannot be developed. And no matter what rules are developed, they potentially invite Commission and court review, thus injecting the government into every decision to carry or not to carry a particular program.

Each of these arguments is without merit. Individually and collectively they reflect a grossly misleading and warped view of the regulatory scheme.

1. Nondiscrimination in the sale of advertising time will not result in a national agenda determined by the affluent; it will increase the number of voices heard.

While nondiscriminatory treatment of paid editorials might result in some advantages to the affluent, "the mere fact that wealthy people may use their opportunities to speak more effectively than other people is not enough to justify eliminating those opportunities entirely" (App. 485); i.e., it does not support a flat ban on controversial paid editorials. The "marketplace of ideas" (whether books, movies, pamphlets, newsprint or broadcasting), like any other marketplace, inevitably grants some advantage to those who can pay the price of admission. The wealthy, after all, can purchase a newspaper or broadcast station to

speak; the poor, with scarcely enough money to purchase short spot announcements, cannot. Wealthy business interests can freely purchase spot announcements to purvey their views on many products (automobiles,[65] and until recently, cigarettes [66]) which advocate views on important social issues.[67] Less wealthy groups may not be able to match them dollar for dollar in purchasing time to discuss social issues. This is no justification, however, for excluding the poor altogether. The door of speech should not be slammed in their face when they do raise enough money to pay current rates.

In fact, the availability of paid editorial time on a non-discriminatory basis is likely to produce benefits for the less wealthy. For example, $20.00 will buy one minute of access to about 10,000 listeners of WMOD-FM in Washington, D.C.[68] In Cleveland, Ohio, a metropolitan area of some 3,000,000 people, $50.00 will buy 30 seconds of prime time on one of the city's leading stations, WKYC. In Sandersville, Georgia, a community with only one radio station, the exclusion of Blacks from any access to airwaves was so serious that the Commission ordered a hearing to determine, among other things, if Blacks had been discriminated against in the allocation of free public service announcements. *WSNT, Inc.*, 27 F.C.C. 2d 993

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[65] *Friends of the Earth* v. *F.C.C.*, 449 F.2d 1164 (D.C. Cir. 1971).

[66] *Banzhaf* v. *F.C.C.*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. den. sub nom. Tobacco Institute* v. *F.C.C.*, 396 U.S. 842 (1969).

[67] *Cf. Wilderness Society*, 30 F.C.C.2d 643, *aff'd on rec'n*, 31 F.C.C.2d 729 (1971), (environmental impact of the trans-Alaska pipeline).

[68] *American Research Bureau Radio Estimates*, January 13-February 9, 1972. Respondent was able to obtain listernship data only for Washington, D.C. stations.

(1971). The nondiscrimination rule adopted by the court below and $3.75 (the cost of a one minute spot) would possibly have avoided the lengthy, cumbersome, and expensive challenge to the station's license renewal. Only ten cents more ($3.85) would allow a speaker to present his views for one minute over KBVB, a Reno, Nevada station.[69]

Moreover, one need not be wealthy to purchase one spot announcement and in it request funds to finance the purchase of additional time. The Commission has ruled that it would be arbitrary to bar significant polical parties from soliciting funds (App. 269-70).[70] Nondiscriminatory treatment requires that other groups be afforded a comparable opportunity.

A more substantial problem, as the court below observed, "is not that editorial advertising will cost money, but that it may be dominated by one group from one part of the political spectrum" (App. 485). If a serious danger develops of the public being overwhelmed by a particular viewpoint via paid editorials,[71]

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[69] All information reflects rate card data quoted in *Standard Rate & Data Service, Inc.*, Volume 54, Number 6 (June 1, 1972). Actual rates are often lower.

[70] See discussion at p. 15, *supra*.

[71] It is highly likely that an attempt to saturate the airwaves with one set of views would lead to "counter-campaigns." The petitioners' briefs refer to the "wealthy" as though they were an organized, monolithic lobby determined to impose a particular set of values upon society. But views on national priorities and on the many sides of any issue are not uniform among wealthy interests. A campaign by electric companies, for example, in favor of increasing nuclear generating stations might be opposed by the local natural gas distributor. Similarly, if BEM launched a massive anti-war campaign it is likely that those businessmen and others who support current policies would respond.

These counter-campaigns are not without significance for the

the licensee has a variety of ways to assure balanced coverage of contrasting viewpoints.

The court below explicitly recognized that it might be necessary to limit the amount of time devoted to a particular group or exposition of a "narrow viewpoint" (App. 485). Such limitations can be based on the same reasonable, good faith judgments a licensee must make under the fairness doctrine; the licensee can retain the same broad discretion accorded him by the Commission[72] and the courts[73] in defining the issues raised.[74] It is pure sophistry to argue that licensees are incapable of judging whether a "narrow view-

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Cullman problem discussed below. Much of the balance required to offset paid editorials can be achieved without any need for the licensee to sacrifice either a cent in revenue or a single moment of programming time.

[72] *E.g., National Broadcasting Co.*, 25 F.C.C. 2d 735 (1970) (opposing viewpoint on "issue or relative safety of private versus commercial pilots (and therefore the relative hazards created by planes so flown)" is subsumed within contrasting views presented on the problem of "air congestion near major airports").

[73] *E.g., Green* v. *F.C.C.*, 447 F.2d 323 (D.C. Cir. 1971) (contrasting views on issue of whether it is ever desirable, rewarding or the best way to serve one country by bearing arms is balanced by views opposing the draft and the Vietnam war).

[74] There is a direct, costless remedy to licensees if they are genuinely concerned that only the wealthy are gaining access to discuss issues of concern to them. Licenses can take time already devoted and allocated to presenting *free* public service announcements and allow them to be used by community groups to present their editorial messages. (This process is costless, since the time is already allocated to presenting public service announcements of a more traditional nature, such as military recruitment ads, ads promoting Boy Scouts, charitable organizations, etc.) Indeed, a number of licensees have already successfully experimented with such a system. Several others are about to adopt similar schemes. And even major group owners, such as Westinghouse Broadcasting, are beginning to use the system. "1972's 'Vox Pop' is Access Through

point" is unduly duplicative of an issue already aired; they make these judgments daily in administering the fairness doctrine.

2. Nondiscriminatory sale of advertising time need not result in excessive financial burdens or unwarranted incursion on a licensee's journalistic discretion.

A licensee's sole legitimate interest in refusing to run a paid editorial stems from obligations that might be incurred under the fairness doctine.[75] Under the fairness doctrine paid editorials might create an obligation to present opposing points of view free of charge, *Cullman supra,* or otherwise impinge on a licensee's total control over the content of its programming.

As the discussion *supra* (p. 53) makes clear, the fairness doctrine vests broad discretion in the licensee.

Spots," *Broadcasting Magazine,* July 10, 1972, p. 29. These "free speech messages" could be used to allow contrasting viewpoints to the paid editorials of the wealthy. This would not only prevent the domination of the air by vested, moneyed interests. It would go far to alleviate the concern that imbalances created by paid editorials would have to be offset by intrduing on the licensee's journalistic discretion or by presenting contrasting views on time otherwise required for sale to advertisers.

[75] The broadcaster petitioners assert an interest in keeping frivolous, unimportant, or crackpot speeches off the air. (See pp. 23-24, *supra.*) These assertions are anathema to First Amendment interests and have been discussed above. (See pp. 15-23.) They warrant no further attention here.

It should, however, be noted that the broadcasters' instinct to censor is present even when the issue is of clear public significance and there are no possible *Cullman* problems or infringements on a licensee's journalistic discretion. In testimony before Congress, an executive of Allstate Insurance Company stated that the networks had refused to run ads praising airbags even after the company had offered to pay for the time used in broadcasting replies to the ads. See footnote 54, *supra.*

E.g., Editorializing Report, supra, 13 F.C.C. at 1251. *See Honorable Oren Harris,* 40 F.C.C. 582, 585-86 (1963). The licensee's discretion extends to determining which issues will initially be covered; which issue(s) is (are) raised by the program in question; whether the matter is controversial; the amount of time to be devoted to opposing views; the scheduling of the opposing views; the frequency with which such views are presented; the format with which contrasting views are presented; and the spokesman who will present the views. *Applicability of the Fairness Doctrine to the Handling of Public Issues,* 29 Fed. Reg. 10415, 10416 (1964) (hereinafter "Fairness Primer"). *See Committee for Fair Broadcasting,* 25 F.C.C. 2d 283, 291-94 (1970). *See* generally *Fairness Primer, supra.* The fairness doctrine "does not apply with the precision of 'equal opportunities' "; rather the requirement is one of overall balance in programming and reasonable opportunities to present contrasting views. *Ibid.*

Applying these standards to the potental impact of paid editorials on a licensee's financial position under *Cullman* and on a licensee's journalistic discretion, it is plain that there is ample latitude for resolving the problems raised by nondiscrimination against paid editorials. Obviously if a proffered editorial deals with an issue that is not controversial the fairness doctrine does not apply.[76]

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[76] As in the fairness doctrine cases, the licensee would make the determination as to the issue raised, its controversiality, etc., subject to review for reasonableness by the Commission. Contrary to the strident tone of petitioners' briefs, this would not result in "a constitutional litigation." It would be a garden variety review of administrative action to assure that it was reasonable.

Editorials dealing with controversial issues already covered by the licensee might inject a new slant or a new voice.[77] However, this is unlikely to give rise to any new fairness obligations, given the latitude afforded a licensee in defining the issue raised, p. 53, *supra,* and in determining whether coverage is balanced.[78] In the highly improbable event that such an editorial advertisement did trigger fairness obligations, a licensee *might* be justified in refusing to air it, but this cannot justify the flat ban at issue in the instant case.

Moreover, although an editorial advertisement might give rise to a fairness obligation, the *Cullman* doctrine need not impose undue financial hardships; nor need a licensee's journalistic integrity be seriously compromised. If the volume of paid editorial ads is such that there is a serious threat to a licensee's revenue if he provides opposing viewpoints in spot advertising time,[79] he can meet his obligations via other programming. While that might impinge on the licensee's "journalis-

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[77] BEM's anti-war editorials probably fall within this category. WTOP has not stated that BEM's editorials would raise the ratio of anti-war to pro-war views to an impermissible proportion. Indeed the F.C.C. has accepted WTOP's affidavit that "each of the viewpoints embodied in the BEM announcements has been expressed on a number of occasions in various types of broadcasts over WTOP." (App. at 352).

[78] In *National Broadcasting Co. (WNBC)*, 16 F.C.C. 2d 947 (1969), the Commission held that a licensee who presented cigarette commercials advocating the use of cigarettes eight (8) times as often as it presented anti-smoking announcements was in compliance with the fairness doctrine.

[79] As discussed above, there is nothing to indicate that this volume of paid editorial ads will be realized.

tic discretion", the encroachment need not be great. Given his wide ranging discretion in presenting an over all balance in programming, a licensee may balance and trade off between declines in revenue and interference with "journalistic integrity." He need not sacrifice all, or even any of either, to administer a nondiscriminatory regime of accepting paid editorials.

Lastly, editorial advertisements may deal with controversial issues receiving inadequate or no attention from a licensee. If so, then basic First Amendment objectives have been served. Moreover, as the discussion in the previous paragraph makes clear, such a situation need not mean excessive financial burden or undue infringement on journalistic discretion. And again, the fact that *some* editorial advertisements may create these problems can hardly be said to support a flat ban on *all* such editorials.

In any event, absent a showing of overwhelming hardship,[80] licensees should not be permitted to flatly refuse to air issues of controversy and importance in their communities. It is desirable for paid editorial announcements to trigger a licensee's obligation to inform its audience of significant views on controversial issues and to cover fairly all representative viewpoints. Indeed, licensees already have this obligation.[81] It is not

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[80] Again, the showing required and whether it had been met would essentially be matters for the agency to determine. Each case would not involve major constitutional litigation. See pp. 60-61, *infra*.

[81] *E.g, Gary Soucie,* 24 F.C.C. 2d 743, 750-51 (1971), *rev.'d on other grounds sub nom. Friends of the Earth* v. *F.C.C.,* 449 F.2d 1164 (D.C. Cir. 1971).

unreasonable to expect licensees to bear this "burden" as a part of the privilege of holding a broadcast license.

It has also been suggested that the fairness doctrine, or at least the *Cullman* aspect of it, i.e., the obligation to present opposing points of view free of charge, be suspended as to paid editorial advertisements (App. 281, 486). There is objection to this on the ground that only those rich enough to buy time would be heard.[82] This is not necessarily so. We have already noted that a licensee who carries these editorials could limit the number of such announcements or provide responses in time normally allocated to public service announcements. Moreover, if *Cullman* were suspended, the tendency of groups with opposing views to raise and expend funds to present their views would be heightened. And a *Cullman* exemption need not be a blanket exemption. The applicability of *Cullman* might be suspended upon a showing of threatened financial harm in particular cases.

In fact, the Commission has recognized the wisdom of a suspension of the *Cullman* aspect of the fairness doctrine in other situations. In *Nicholas Zapple,* 23

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[82] The Government concludes that suspending or adjusting *Cullman* is hardly likely to result in a " 'better' regulatory scheme than, or a significant improvement in, the present system which requires licensees to cover public issues and present contrasting views." U.S. Br. at 57-58. This of course is not the issue. The court below mandated no scheme that necessarily is or will be "better" or worse than the present one. The court merely struck down an unconstitutional discrimination within an otherwise permissible scheme and directed that the future administration of the regulatory scheme reflect nondiscriminatory treatment for editorial advertisements.

F.C.C. 2d 707 (1970), it ruled that the fairness doctrine, rather than the "equal opportunities" provision of Section 315 of the Communications Act, applies where a spokesman for, or organization backing, a candidate buys time to endorse his candidacy but the candidate himself does not appear. The Commission ruled that the licensee would be required to sell time to a spokesman for the opposing candidate but not to make time available free, even though *Cullman* would ordinarily apply. The Commission justified this exception from *Cullman* and creation of a "quasi-equal opportunities" rule on the ground that to rule otherwise would allow the second candidate to have his candidacy subsidized by receiving free time after the first candidate had purchased time.

Zapple's reasoning is directly in point here. If paid editorials are not allowed because of *Cullman,* speech is silenced. If *Cullman* is applied, then the first spokesman purchasing time might be subsidizing his adversary. *Zapple* indicates that the Commission has both been willing and able to respond imaginatively to such specialized regulatory problems. It can do so here, too.

3. Nondiscrimination in the sale of time will not result in excessive govenmental incursion into broadcaster journalistic discretion.

The broadcaster petitioners raise the related spectres of "administrative apocalypse" (App. 484) in implementing guidelines and omnipresent governmental censorship through agency and court review of licensee decisions in developing and administering guidelines governing non-discrimination against paid editorials. (ABC Br. at 44-56; CBS Br. at 39-46; WTOP Br. at 29-34, 40-44, 45-52). The Government, while recogniz-

ing that there may be difficulty in developing a reasonable system of allocation (U.S. Br. at 56), is less concerned about censorship through Commission and court review. Rather its concern is that the Commission might be inundated with disputes over discrimination in the sale of time for editorials. The Government itself cites an eruption of litigation in the fairness area (U.S. Br. at 60-61, n. 60). Such a development is to be anticipated and welcomed in the evolution of a body of law dealing with precious First Amendment rights. There may well be litigation testing whether particular guidelines are discriminatory. But the fact that a judicial decision concerning First Amendment rights *may* create future administrative problems is no reason for the Court to avoid resolving important constitutional issues; this is particularly true here since the Commission has broad discretion to formulate and adopt guidelines designed to minimize such problems. See *Red Lion, supra,* 395 U.S. at 393.[83]

Moreover, as the standards for nondiscriminatory treatment of editorial advertisements emerge and are strengthened, there is no reason to believe that every refusal to broadcast a program will be carried to the courts or occasion a constitutional litigation. The more likely result is that if they are brought at all, more cases will be resolved at the administrative level on the basis of established case law and definitive regulations.

Indeed, developing and implementing guidelines concerning paid editorials on controversial issues should alleviate the Government's concerns. In implementing these guidelines, the same fairness doctrine

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[83] *Cf. Freedman* v. *Maryland,* 380 U.S. 51 (1965).

standards of deference to the reasonableness and good faith of the license could be operative.[84] Other reasonable rgeulations, not necessarily limited to time, place and manner,[85] governing the acceptance of editorials could be adopted.[86] And of course should demand for editorial time exceed supply, the courts have recognized both the feasibility and necessity of allocating a forum between competing claimants.[87]

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[84] However desirable this deference to licensee discretion, it serves to highlight the need for non-discrimination in the sale of time.

[85] "*At the least*, there may be regulations determining the time, place, and manner of speech" (App. 483 (emphasis supplied)).

[86] As discussed above, the Court, for examle, left open the possibility that it might be necessary to limit the amount of time sold for presentation of a particular viewpoint (App. 485).

[87] *E.g., Kissinger* v. *New York City Transit Authority*, 274 F.Supp. 438, 443, n. 6 (S.D.N.Y. 1967):

> Defendants also argue that if they accept the posters for display, they will have to accept other posters relating to United States' participation in the war in Vietnam with the result that commercial advertising will be curtailed and the subways will become a political and ideological battlefield. Even if the Authority and the Advertising Company are required to accept the posters for display, however, it does not follow that others must be accepted, and, in addition, the Authority and the Advertising Company could impose reasonable regulations on the display of plaintiff's posters and other of a similar nature as to the number to be displayed and the time and place for their display.

See also *Farmer* v. *Moses, supra; Wirta* v. *Alameda-Contra Costa Transit District, supra; Robert Harold Scott, supra; United Broadcasting Co. (WHKC), supra.* Licensees should be more adept at adopting reasonable regulations than are bus companies. Guidelines might include a preference for new viewpoints and/or new speakers over viewpoints and/or speakers adequately presented, a preference for representatives of groups that have historically been excluded from the mass media, etc.

4. The licensee's interests and the Commission's authority.

We have demonstrated that there are no sound reasons which justify discriminatory access for paid editorials. Such access will not destroy the fairness doctrine; indeed, in almost all cases it will further the objectives of fairness and presents problems no different than those already encountered in administering the fairness doctrine. In those unlikely cases where a licensee's financial position is seriously debilitated, the standards and experience gained under that very same fairness doctrine can be the safeguards for assuring its continued vitality.[88]

In *United Broadcasting Co.* (*WHKC*), 10 F.C.C. 515 (1945), the Commission stated that a station that followed the discriminatory policy at issue here contravened the public interest.[89] The petitioners have advanced no reasons why that policy is no longer viable.[90] They have not shown that their primary interest, i.e., protecting their own speech and the right

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[88] BEM does not by any means suggest that only in the guidelines or principles here advanced can appropriate guidelines be found for administering nondiscriminatory treatment for paid editorials. We suggest these guidelines only as a starting point for analysis and to show that workable guidelines can be developed.

[89] See App. 487.

[90] The Government attempts to distinguish *United* by noting that it predated the *Editorializing Report* (U.S. Br. at 46). The error of this attempt has been discussed above, pp. 47-48, *supra*. But it should also be noted that the proposed station operation adopted by the Commission in *United* included *both* a provision for nondiscriminatory treatment of paid editorials and a provision which parallels the modern statement of the fairness doctrine.

> The station will see that its broadcasts on controversial issues, considered on an overall basis, maintain a fair balance among the various points of view, i.e., over the weeks and months it will maintain such a balance with respect to local and network programs, both sustaining and commercial alike. 10 F.C.C. at 517.

of the public to hear, can not be accommodated under such a system. They have no interest in keeping paid editorials off the air except as their own speech is affected via the fairness doctrine.[91] Their speech is and can be further insulated from unreasonable incursions if reasonable guidelines are developed.

Recently the Commission acknowledged that a licensee's interest in keeping even highly controversial speech off the air is minimal. A white segregationist candidate for U.S. Senator purchased blocs of time to run an ad claiming that the incumbent's policy "takes jobs from us whites and gives those jobs to the niggers . . . niggers want integration . . . because the niggers want our white women . . . you cannot have law and order and niggers too." The Commission refused to prevent stations from running the ad. Although the case arose under the "no censorship" clause of Section 315, the Commission went beyond that provision in stating:

> It is the judgment of the Commission, as it has been the judgment of those who drafted our Constitution and of the overwhelming majority of our legislators and judges over the years, that the public interest is best served by permitting the expression of any views that do not involve "a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminello* v. *Chicago,* 337 U.S. 1, 4 (1949); *Chaplinsky* v. *New Hampshire,* 315 U.S. 568; *Ashton* v. *Kentucky* [384 U.S. 195], 34 LW 4398 (1966). This most assuredly does not mean that those who uphold this principle approve of the opinions that are expressed under its protection. On the contrary, this principle insures that the most diverse and opposing opinions will be expressed, many of which may be even high-

[91] Obviously licensees could prevent illegal materials such as obscene or defamatory editorials from being broadcast.

> ly offensive to those officials who thus protect the rights of others to free speech. If there is to be free speech, it must be free for speech that we abhor and hate as well as for speech that we find tolerable or congenial.
>
> *Letter to Lonnie King,* F.C.C. 72-711, mimeo. no. 80175 (August 3, 1972), quoting *Anti-Defamation League of B'nai B'rith,* 4 F.C.C.2d 190, 191 (1966), *aff'd Anti-Defamation League B'nai B'rith* v. *F.C.C.*, 131 U.S. App. D.C. 146, 403 F.2d 169 (1968) *cert. denied,* 394 U.S. 930 (1969).

There is a public interest and a constitutional right in hearing even this speech, if for no other reason than to demonstrate its error. Moreover, speech that is "frivolous" or "abhorrent" today may deal with the significant issues of tomorrow. The listening public, not licensees, must determine which speech is worthy of consideration and which is not.

5. Section 3(h) and the "common carrier" doctrine.

The petitioners, citing Section 3(h) of the 1934 Communications Act, 47 U.S.C. § 153(h) as amended (1964), which prevents licensees from treatment as "common carriers," argue that the ruling below would drag licensees into "common carrier" status, unable to resist a deluge of requests for airtime (ABC Br. at 36-38; CBS Br. at 28-33; WTOP Br. at 34-40; U.S. Br. at 40-45).

This argument is faulty on several grounds. Primarily, it misconstrues the decision below. The court of appeals carefully limited itself to prohibiting licensees which *elect* to sell some of their airtime to advertisers from flatly refusing to sell any of that time to editorial spokesmen. The basic control over whether to sell advertising time and, if so, how much, rests with the licensee. This is the opposite of a common carrier, which

must sell to all who seek its service. The history and purpose of Section 3(h) confirm this basic proposition.

Section 3(h) provides only that "a person engaged in radio broadcasting shall not . . . be deemed a common carrier." Although Congress did not define "common carrier" the term normally describes a public utility must accept *all* requests for service and at rates fixed or approved by regulatory agencies.[92] In Section 3(h), Congress thus relieved broadcast licensees of rate regulation and the obligation to accept *all* requests for airtime, whether commercial or editorial.

Petitioners cite a fragment of legislative history of the 1927 Radio Act to support their contention that § 3(h) prohibits any requirement that they not discriminate against editorial advertisers (*eg.* U.S. Br. at 41). The cited language, which Congress ultimately rejected,[93] provided that once a licensee permitted its

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[92] In 1925, a Committee on Legislation of the Fourth National Radio Conference urged that the Radio Act "not bring the broadcasting stations into the category of recognized public utilities." The Committee viewed this category as including "such matters as *regulation of rates* and other similar features of supervision exercised by governmental bodies over public utilities. . . ." *Proceedings of the Fourth National Radio Conference and Recommendations for Regulation of Radio*, p. 34 (Nov. 9-11, 1925) (Wash. Gov't. Printing Office, 1926). In *Great Lakes Broadcasting Co., supra*, at 32, the Commission also refused to treat broadcast licensees as common carriers, stating that such a station would then "have to accept and transmit [programming] for *all* persons on an equal basis without discrimination in charge, and according to rates fixed by a governmental body". BEM, in contrast, does not argue that stations must accept *all* requests for airtime, nor does it contend that the Commission must regulate advertising rates.

[93] "In any event, unsuccessful attempts at legislation are not the best of guides to legislative intent. *Fogarty* v. *United States*, 340 U.S. 8, 13-14 (1950); *United States* v. *United Mine Workers*, 330 U.S. 258, 281-282 (1947)." *Red Lion, supra*, at 382 n. 12.

facility to be used "for the discussion of any question affecting the public," it should be deemed a "common carrier" with respect to such questions. In rejecting the proposed language, Congress sought to ensure that licensees would not have to accept *all* requests for airtime on public issues they covered.[94] Moreover, the rejected language only embodied the "door opener" concept—namely, that any station broadcasting one side of a controversial issue would be required to present opposing viewpoints—which has become the basic part of the fairness doctrine.

The Commission itself has accepted this analysis. *United Broadcasting Co. (WHKC), supra,* at 517-18, prohibited licensee refusal to sell time to controversial speakers and handily disposed of Section 3(h) objections:

> It is recognized, of course, that the physical limitations on the amount of spectrum space available for radio broadcasting and the large demands upon radio stations for use of time make it impossible for every person desiring to use the facilities of a station to be granted this privilege. Under section 3(h) of the act, broadcast stations are expressly declared not to be common carriers. These facts, however, in no way impinge upon the duty of each station licensee . . . to make sufficient time available, on a nondiscriminatory basis, for full discussion thereof, without any type of censorship . . .
>
> [T]he operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues . . .

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[94] The statements cited by petitioners support this interpretation. Thus Senator Dill was afraid the proposed language would force the broadcaster to "accept *anything and everything* that was offered him so long as the price was paid" (67 Cong. Rec. 12504). See U.S. Br. at 41. Neither BEM nor the court of appeals have ever suggested that licensees must sell *all* their programming, nor even *all* their advertising time.

is inconsistent with the concept of public interest. . . .[95]

The Commission cannot at this late date repudiate the reasoning of its earlier opinion without some reasoned and compelling justifications. Yet none have been advanced.

Rather than to permit discriminatory policies regarding the sale of advertising time, Section 3(h) was designed to prevent the Commission from regulating broadcast licensees under the detailed "common carrier" provisions of Title II of the Communications Act of 1934, 47 U.S.C. et seq. (1964).[96] In *United States* v. *RCA*, 358 U.S. 334 (1959), this Court defined "common carriers" as able to charge "only the published tariff." "Free rate competition" for such carriers is "modified by federal controls." Tariffs established by regulatory agencies must be "reasonable." *Id.* at 348. By contrast, the Court concluded that radio broadcasters were not "common carriers," and therefore not subject to Title II of the Act:

> While the television industry is also a regulated industry, it is regulated in a very different way. That difference is controlling. Radio broadcasters, including television broadcasters, . . . are not in-

[95] *Accord, Robert Harold Scott*, 11 F.C.C. 372, 376 (1946). See also *Office of Communications of United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966): "The argument that a broadcaster is not a public utility is beside the point. True it is not a public utility in the same sense as strictly regulated common carriers or purveyors of power, but neither is it a purely private enterprise like a newspaper or an automobile agency." *Id.* at 1003. This in-between status at the least requires licensees which sell advertising time to accept some, but not all, requests to speak on controversial issues as ruled below.

[96] Commissioner Johnson also accepts this view (App. 415).

> cluded in § 3(h) of the Communications Act . . . , as are telephone and telegraph companies. Thus the extensive controls, including rate regulation of Title II . . . , do not apply. Television broadcasters remain free to set their own advertising rates. . . . *United States* v. *RCA, supra* 358 U.S. at 348-49.

Nothing in the ruling below prevents broadcasters from setting their own rates, nor, indeed from selling no time to the public at all. It merely holds that when a licensee does sell advertising time and rates he has determined, he cannot flatly refuse to sell any of that time to an editorial spokesman willing to pay his rate.

Finally, whatever the application of Section 3(h), it seems apparent that Congress was only concerned that advertiser demands might invade programming time. Common carrier status for broadcasters might "crowd most or all of the better *programs* off the air." *Great Lakes, supra,* at 33. Broadcasters might be forced to "give all their time" to public discussion (67 Cong. Rec. 12504). Absence of Section 3(h) might disrupt the "percentage" of the broadcast day "devoted to news and discussion or consideration of public issues." *Editorializing Report, supra,* at 1249. The lower court's ruling, however, would not affect programming time: it only bars discrimination in advertising time "relinquished by broadcasters to others" (App. 464). And the broadcaster has complete control over how much, if any, time he relinquishes.

Thus, the "common carrier" arguments have little to do with the facts of this case; petitioners have succeeded only in knocking down a straw man.

IV. FLAT BANS ON THE SALE OF EDITORIAL ADVERTISING, AS APPROVED BY THE F.C.C. IN THIS CASE, CONSTITUTE SUFFICIENT "STATE ACTION" TO BE SUBJECTED TO FIRST AMENDMENT CONSTRAINTS.

The court below thoroughly analyzed the relationship between broadcast licensees and the Federal Government and held that, although they may be "private entities" for some purposes, broadcasters are subject to First Amendment constraints when they discriminatorily allocate their air time among editorial speakers (App. 455-464).[97] The "state action" finding was grounded in the substantial "governmental involvement in" and "public character of" the broadcast media (App. 456). The Commission's explicit approval of flat bans in *DNC* and *BEM* (App. 461), and the "importance and suitability of" the broadcast media as a forum "for the communication of ideas" (App. 459).[98]

The three broadcaster petitioners and *amicus* NBC argue that the court below erred in finding "state action," that broadcasters are private businesses not subject to the First Amendment, and that they may therefore accept or reject editorial advertisements on any basis, discriminatory or non-discriminatory.[99] On the other hand, the Government apparently concedes the "state action" finding:

> The Commission and the court below are agreed that broadcast regulation must be guided by the

[97] The Commission apparently concurs. See *DNC* (App. 266).

[98] Commissioner Johnson, in an exhaustive analysis of state action principles (App. 378-99), also concluded that the actions of licensees and the Commission in rejecting editorial announcements were "sufficiently involved with the state to invoke the restraints of the Constitution" (App. 398).

[99] See CBS Br. 47-55; ABC Br. 25-30; NBC Br. 15-17; WTOP Br. 52-62.

public's First Amendment interests in the communications media; indeed Congress and the Commission have recognized this from the outset. And it is common ground that the public has an interest not only in the content of the discussion of controversial public issues, but also, as the Court of Appeals put it, "in the mode or manner" of the presentation (App. 466). U.S. Br. at 32-33.[100]

We submit that the pervasive regulatory scheme and the unique importance of the broadcast media to mass communications fully supports the finding of state action by the court below.

1. State action derives from the license or "lease" of control over public property from the Government to individual licensees and the Government's close supervision and control of licensees' broadcasting policies.

There is no magic formula for determining when the actions of an allegedly "private" entity like a broadcast licensee bring it within the orbit of constitutional imperatives. "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). Under all of the leading tests for determining state action, however, including those set forth in *Burton*, and last term in *Moose Lodge No. 107* v. *Irvis*, —— U.S. ——, 92 S.Ct. 1965 (1972) and

[100] Application of the First Amendment to broadcasters' advertising policies need not be based on a finding of "state action." It can be grounded in the "public interest" imperatives of the Communications Act (e.g. 47 U.S.C. § 307(a)), the fairness doctrine (47 U.S.C. § 315), and the overall puposes of the regulatory scheme. Thus, this Court's finding that "broadcasting is clearly a medium affected by a First Amendment interest" (*Red Lion*, *supra*, 395 U.S. at 386), is not bedded on an *explicit* finding of state action.

Lloyd Corp., Ltd. v. *Tanner,* —— U.S. ——, 92 S.Ct. 2219 (1972), broadcast licensees are unquestionably subject to First Amendment restraints in the allocation of their advertising time.

In *Burton,* a state agency leased space in its large municipal parking garage to a privately owned restaurant. The restaurant's refusal to serve Negroes was held to constitute state action violative of the Fourteenth Amendment. Although the Court enumerated a number of decisional factors, they all derived their force from the underlying lease relationship.

Thus, "[t]he land and building were publicly owned" and "dedicated to 'public use' in performance of 'essentially governmental functions' " (365 U.S. at 723). The restaurant area was not "surplus" state property, but an "integral and, indeed, indispensible part o fthe State's plan to operate its" parking lot (*Id.* at 723-24). The lease arrangement conferred on both lessor and lessee a "variety of mutual benefits." (*Id.* at 724). The restaurant was not a "private club" operating on private property as in *Moose Lodge, supra,* but held itself open for business to the general public. The Negro complainant went to the restaurant for service, not for some non-restaurant related activity. Compare *Lloyd Corp., supra,* discussed, *infra,* at pp. 78-79.

Given these factors, the Court concluded that "when a State leases public property in the manner and for the purpose shown to have been the case here," it "has elected to place its power, property and prestige behind the admitted discrimination." (*Id.* at 726.) Under such circumstances, the lessee is bound by constitutional proscriptions "as certainly as though they

were binding convenants written into the agreement itself." (*Ibid.*)[101]

Each of these factors applies to the present case. The channels of broadcast transmission, which WTOP and other stations are exclusively licensed to operate, are publicly owned. Section 301 of the Communications Act of 1934 makes this explicit:

> It is the purpose of this Act . . . to *maintain the control* of the United States over all the channels of interstate and foreign radio transmission; and to provide for the *use* of such channels, but *not the ownership* thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, *beyond the terms, conditions, and periods of the license.* 47 U.S.C. § 301 (1964) emphasis supplied).

The broadcast frequencies are also dedicated to "public uses," the licensee being required to operate "in the public interest, convenience, and necessity." 47 U.S.C. §§ 307(a), 309(a) (1964).

Broadcast frequencies are also not "surplus" government property, but an "integral" part of its scheme to "generally encourage the larger and more effective use of radio in the public interest." 47 U.S.C. § 303(g)

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[101] The F.C.C., in prohibiting broadcasters from engaging in discriminatory employment practices, acknowledged the relevance of *Burton*:

> [A] substantial case has been made that because of the relationship of the government of the United States to broadcast stations, the Commission has a constitutional duty to assure equal employment opportunity. . . . The contention is rested upon such decisions as *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961).

Nondiscrimination Employment Practices of Broadcast Licensees, 18 F.C.C. 2d 240, 241 & n.2 (1969).

(1964). Indeed, government regulation alone makes "radio communication *possible* by requiring licensees to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum." *Red Lion, supra,* 395 U.S. at 389 (emphasis supplied).[102] Because of these factors, and because as monopoly holders of scarce public resources they must act "as proxies for the entire community," *Red Lion,* 395 U.S. at 394, licensees also perform a "governmental function."

Although broadcast stations are not constructed with public funds, the government subsidizes and protects their operations against economic competition. See *F.C.C.* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 476 (1940); *Carroll Broadcasting Co.* v. *F.C.C.* 258 F.2d 440 (D.C. Cir. 1958). Their frequencies are a "valuable part of the public domain."[103] and are licensed to them for only a nominal fee. Licensees "have often attained their present position because of their initial government selection in competition with others." [T]hese advantages are the fruit of a *preferred position conferred by the Government." Red Lion,* 395 U.S. at 400 (emphasis supplied).

Finally, the broadcast license confers on both parties a "variety of mutual benefits." The licensee receives a limited monopoly, protected from unlimited competition. The government provides broadcast service for the nation without constructing and operating its own stations.

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[102] Compare *Moose Lodge, supra,* discussed, *infra,* 77-78. Were the private club's license revoked, it could still continue—without serving alcohol. Broadcast licensees, on the other hand, cannot operate at all if their licenses are revoked. Indeed, the Government imposes criminal sanctions on those who broadcast without a license. 47 U.S.C. § 501 (1964) ($10,000 fine, one year's imprisonment).

[103] *Office of Communication of the United Church of Christ* v. *F.C.C.,* 359 F.2d 994, 1003 (D.C. Cir. 1966).

These factors, coupled with the elaborate governmental control over broadcasting,[104] make it impossible

[104] There are many legislative and administrative regulations which demonstrate the soundness of the finding by the court below that "the general characteristics of the broadcast industry reveal an extraordinary relationship between the broadcasters and the Federal Government—a relationship which puts that industry in a class with few others. It is one of 'inter-dependence' and 'participa[tion].' See *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961) (App. 459-460).

These aspects of regulation of broadcast licensees include F.C.C. authority to: assign frequency bands (47 USC Section 303(c)); allocate licenses by location (Section 303(d)); regulate apparatus (Section 303(e)); establish service areas (Section 303(a)); regulate chain ownership (Section 303(k)); require the keeping of detailed records (Section 303(j)); establish qualifications of licensees (Section 303(l) (one)); suspend licenses (Section 303(m) (one)); inspect station facilities (Section 303(n)); require publication of call letters and other information (Section 303(p)); make rules to effect regulation of radio and television (Section 303(r)); require that television sets can receive all signals (Section 303(s)); regulate the granting of licenses and terms thereof (Sections 307 and 309); prescribe information to be supplied by applicants for license (Section 308(b)); regulate the transfer of licenses (Section 310); impose sanctions on licensees, including revocation of license (Section 312); require fair coverage of controversial issues (Section 315); control the operation of transmitting apparatus (Section 318); prohibit the use of offensive language (Section 326).

Pursuant to statutory authority, the FCC by regulation (47 CFR Section 73.17 *et seq.*) has promulgated myriad regulations governing all aspects of licensee conduct, from hours of operation (Section 73.23) to multiple ownership of licenses by a single person (Section 73.35); from station location and program origination (Section 73.30) to maintenance of detailed logs of programming, operation and maintenance (Sections 73.111-116); from billing practices (Section 73.124) to the personal attack and political editorial fairness requirements upheld in *Red Lion* (Section 73.123); from the relationship a licensee may have with a network (Section 73.131-139) to permissible equipment (Sections 73.39-50). The above regulations relate only to AM-radio. Similar regulations exist for FM-radio, (Section 73.201 *et seq.*) and television (Section 73.601 *et seq.*).

to find that the Government is not a "partner" or "joint venturer" in the licensees' operations, at least insofar as they relate to coverage of controversial *public* issues. *Burton, supra,* 365 U.S. at 725; *Moose Lodge, supra,* 92 S.Ct. at 1973.

If anything, the case for "state action" herein is much stronger than *Burton.* Unlike the restaurant in *Burton* which had a twenty-year lease and was not statutorily required to serve the "public interest," broadcast licensees are given three-year licenses which are renewable only if the Government determines that their past programming *performance* has served the "public interest, convenience and necessity." 47 U.S.C. §§ 307(a), 309(a) (1964). Unlike the restaurant lessee, broadcasters are subject to continuing governmental rgeulation of their operations.[105] The Communications Act was specifically designed "to effect Congressional desires 'to maintain . . . *a grip* on the dynamic aspects of radio transmission' and to allay fears that 'in the absence of *governmental control* the public interest might be subordinated to monopolistic domination in the broadcasting field.'" *Red Lion, supra,* at 395, quoting *F.C.C.* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 137-38 (1940) (emphasis supplied). The finding of "state action" here follows *a fortiori* from *Burton.*[106]

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[105] The fairness doctrine, rather than immunizing licensees from the need to broadcast individual speech, see U.S. Br. at 33-34, comprises an important part of continuing government supervision.

[106] The *Burton* rationale is supported by a long line of federal and state cases holding that where the government itself could not discriminate in operating its property, then it cannot avoid the constraints of the Constitution by "leasing" that property to a private individual or corporation. *Turner* v. *City of Memphis,* 369 U.S. 350 (1962) (private restaurant leased from government). For similar cases involving restaurants on public property, see

This Court's recent decisions in *Moose Lodge, supra,* and *Lloyd, supra,* also support the finding of state action by the court. In *Moose Lodge,* a "private" club, using privately owned facilities, refused to serve a Negro guest. The Court concluded that the mere issuance of a state liquor license to the club did not render its discriminatory policy "state action."

Unlike broadcasters, the private club did not acquire its basic right to operate by "lease" from the state; it performed no "public function," was not fi-

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Derrington v. *Plummer,* 240 F.2d 922 (5th Cir. 1956), *cert. denied,* 353 U.S. 924 (1957); *Adams* v. *City of New Orleans,* 208 F.Supp. 427 (E.D. La. 1962); *Anderson* v. *Moses,* 185 F.Supp. 727, 733 (D.C.N.Y. 1960) ("private . . . concessionaire [operated] on public . . . property for the convenience and comfort of the public"); *Coke* v. *City of Atlanta,* 184 F.Supp. 579 (N.D. Ga. 1960); *Nash* v. *Air Terminal Services,* 85 F.Supp. 545 (E.D. Va. 1949). For analogous cases, see *Muir* v. *Louisville Park Theatrical Ass'n,* 347 U.S. 971 (1954) (public amphitheatre leased to private party); *City of Greensboro* v. *Simkins,* 246 F.2d 425 (4th Cir. 1957) (golf course on public land leased to private lessee); *Farmer* v. *Moses,* 232 F.Supp. 154, 159 (S.D.N.Y. 1964) ("when a city or state leases public property [such that] . . . services . . . are actually performed by a 'private' lessee, the latter stands in the shoes of the government"); *Jones* v. *Marva Theatres, Inc.,* 180 F.Supp. 49 (D. Md. 1960) (theatre in city hall); *Tate* v. *Dept. of Conservation & Development,* 133 F.Supp. 53 (E.D. Va. 1955), *cert. denied,* 352 U.S. 838 (1956). See also *Tucker* v. *Texas,* 326 U.S. 517 (1946) (village wholly owned by United States Government).

The courts have specifically applied this doctrine to advertising space leased by the Government to "private" advertising firms. *Kissinger* v. *New York City Transit Authority,* 274 F.Supp. 438 (S.D.N.Y. 1967) (city "leased" public advertising space on city buses to "private" advertising agency); *Hillside Community Church, Inc.* v. *City of Tacoma,* 455 P.2d 350 (Wash. 1969) (private advertising agency operating pursuant to "contract" with city); *Wirta* v. *Alameda-Contra Costa Transit Dist.,* 434 P.2d 982 (Cal. 1967) (publicly owned advertising space on buses "leased" to private advertising company).

nanced by public funds, provided no "mutual benefits" to the state, did not hold itself open for business to the public at large, and did not utilize "public property." Finally, the club did not exercise a "monopoly" over the supply of liquor, given "the availability of liquor from hotel, restaurant and retail licensees."[107] 92 S.Ct. at 1972-73.

Lloyd, involved a privately owned shopping center with a nondiscriminatory "policy, strictly enforced, against the distribution of handbills within the building complex." 92 S. Ct. at 2222. In ruling that anti-war leafletters could legitimately be excluded from the shopping center, the Court stressed several elements. First, unlike *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308 (1968), the handbilling here had "no relationship . . . between the purpose of the expressive activity [opposing the War] and the business of the shopping center." 92 S.Ct. at 2226. Second, the public was invited only to shop in Lloyd Center, not to leaflet. Third, whereas the picketers in *Logan Valley* would have lost any "reasonable opportunity to convey their message to patrons of the Weis store had they been denied access to the shopping center," the leafletters could still reach Lloyd's customers as they entered from outside. 92 S.Ct. at 2227-28.

Each factor distinguishes *Lloyd* from the instant case. First, BEM does not seek to "enter" WTOP's facility for any nonbusiness purposes;[108] it asks only

[107] Unlike liquor, broadcast time is not fungible. WTOP provides a unique audience not available elsewhere. See Exhibit B.

[108] *Cf. Lloyd,* 92 S.Ct. at 2226. "The handbilling by respondents in the malls of Lloyd Center had no relation to any purpose for which the center was built and being used."

to purchase advertising time at established rates. Second, WTOP is exclusively a medium of communication, which sells to others only the opportunity to speak. And third, BEM has no "reasonable opportunity" to convey its message to WTOP's audience other than via WTOP itself. That audience, as WTOP admits, is unique. (Exhibit B.)[109]

Although their speech is fully protected under the First Amendment, licensees lack the freedom to discriminate which private newspapers may possess.[110] Chief Justice (then Judge) Burger has made this absolutely clear:

> [A] broadcaster is not . . . a public utility in the same sense as strictly regulated common carriers or purveyors of power, but neither is it a purely private enterprise like a newspaper or an automobile agency. A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligation imposed by law. A broadcaster seeks and is granted free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened with enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot. After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty. *United Church of Christ, supra,* 359 F.2d at 1003.

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[109] Compare *Mosley, supra,* 92 S.Ct. at 2289, n. 1.

[110] See, *e.g., Associates & Aldrich Co.* v. *Times Mirror Co.,* 440 F.2d 133 (9th Cir. 1971); *Chicago Joint Board* v. *Chicago Tribune,* 435 F.2d 470 (7th Cir. 1970), *cert. denied,* 402 U.S. 973 (1971); *Resident Participation of Denver, Inc.* v. *Love,* 322 F.Supp. 1100 (D. Colo. 1971) (3 Judge District Court).

After five decades of operation, licensees apparently still have not learned that, unlike the appellant in *Moose Lodge, supra,* they are not operating a private club.

2. State action derives from the Commission's involvement in, and approval of, its licensees' flat ban against editorial advertisements.

The court below also found state action to derive from the Commission's approval of the editorial exclusion policies here in issue (App. 461-63). It noted that the Commission "specifically considered and specifically authorized the flat ban," and therefore gave "its imprimatur" to the exclusion on editorial advertising (App. 461). Because the Commission's decision would "inevitably provide guidance for future broadcaster action" (App. 461), the Commission itself supplied the requisite "state action."

The leading supportive precedent is *Public Utilities Commission* v. *Pollak,* 343 U.S. 451 (1952). In *Pollak,* the Court held that a local transit company, which was regulated by the Public Utilities Commission, had a "sufficiently close relation" (*Id.* at 462-63) with the Government to provide state action for First Amendment purposes.

The Court noted that the transit company was a public utility and exercised a "substantial monopoly of street, railway and bus transportation in the District of Columbia," (*Ibid*) but declined to rest its finding of state action on those criteria:

> We do, however, recognize that Capitol Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. [Footnote omitted.] We rely

> particularly upon the fact that that agency, pursuant to protests against the radio program, ordered an investigation of it and, after formal hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby. 343 U.S. at 462.

Similarly, the F.C.C. here received "protests" from BEM and the DNC against the flat ban policies of WTOP and other licensees and, after formal consideration, "dismissed" the complaints on the ground that the "public interest, convenience, and necessity" was not "impaired" by the licensees' policies. This comprises affirmative Commission approval.[111]

State action in the present case is even clearer than *Pollak*. Broadcast licenses expire every three years. The Commission can renew upon finding the licensee's past programming has *affirmatively served* the "public interest." See 47 U.S.C. §§ 307(a), 309(a), (1964). The Commission is thus forced out of a position of neutrality by statute. The periodic issuance of

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[111] *Moose Lodge, supra,* specifically distinguished *Pollak* as follows: "Unlike the situation in *Public Utilities Commission* v. *Pollak* [citation omitted], where the regulatory agency had affirmatively approved the practice of the regulated entity after full investigation, the Pennsylvania Liquor Control Board has neither approved nor endorsed the racially discriminatory policies of Moose Lodge." 92 S.Ct. at 1973, n. 3.

Similarly, none of the cases cited by the broadcasters for the proposition that broadcasters are not governed by the First Amendment involve a regulatory approval of discriminatory policies. See, *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (First Cir., 1950); *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3rd Cir., 1945); *Post* v. *Payton*, 323 F.Supp. 799 (E.D.N.Y. 1971). Moreover, none of those opinions contains thorough analysis of the law and we suggest that their dicta concerning state action is plainly erroneous.

operating authority over an exclusive three-year franchise clearly enhances "state action." [112]

3. State action derives from the power and importance of the broadcast medium, and one dedicated solely to communication.

In determining whether "state action" applies to private entities for First Amendment purposes, this Court has always looked to the nature of the property involved and its suitability for the type of communication in issue. *See, e.g., Marsh* v. *Alabama,* 326 U.S. 501, 504 (1946); *Logan Valley, supra.* Thus *Lloyd* stressed that:

> [t]the hand-billing by respondents in the malls of Lloyd Center had no relation to any purpose for which the center was built and being used. 92 S.Ct. at 2226.
>
> * * *
>
> . . . This Court has never held that a trespassor or an uninvited guest may exercise general rights of free speech on property privately owned and used non-discriminatorily *for private purposes only. Id.* at 2228.

Here, in contrast, we are dealing with property dedicated uniquely and solely to communication, indeed the very type of communication—i.e., advertising—which respondents seek to employ. Moreover, the underlying property, the airwaves, are not private but

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[112] See also *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943), where the Court said: The Communications Act "does not restrict the Commission merely to supervision of [radio] traffic. It puts upon the Commission the *burden* of determining the *composition* of that traffic." *Id.* at 215. The Commission here cannot plead "neutrality." Given its statutory obligation to determine the composition of broadcast programming, its inaction comprises *approval.*

publicly owned and, as illustrated above, are being used discriminatorily.[113]

The signal importance of radio and television as a forum for communication was well put by petitioner ABC (Br. at 18):

> These cases highlight the critical role the broadcast media play in keeping contemporary American society adequately informed on important public issues. That broadcasting in general and electronic journalism in particular have become major sources of information to the American public is, therefore, an undeniable threshold premise.
>
> * * *

In sum, all of the necessary, indicia of "state action" for First Amendment purposes are abundantly present in the case of commercial broadcasters which refuse to sell advertising time to editorial advertisers. They operate a public, not a private, resource utilizing public property. There is extensive governmental regulation and involvement in their operations, making the government their "partner or . . . joint venturer" (*Moose Lodge, supra,* 92 S.Ct. at 1973). The government has specifically ratified the discriminatory policy in issue. And broadcasters operate a public forum unique in its ability to communicate views on public matters to mass audiences.

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[113] For full discussions of this issue, see App. 463, 399-402.

CONCLUSION

For the reasons above stated, the judgment of the court of appeals should be affirmed.

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August 17, 1972

WTOP-AM
Friday, November 13, 1970
6:30 a.m. -- 6:30 p.m.

TIME	ADVERTISEMENT	TYPE	
6:30 a.m.	Safeway Stores	Commercial	60 seconds
6:31 a.m.	United Air Lines	Commercial	60 seconds
6:35 a.m.	Kaplan & Crawford Dodge	Commercial	60 seconds
6:36 a.m.	Maxwell House Coffee	Commercial	60 seconds
6:44 a.m.	WTOP-TV	Station Promotion	30 seconds
6:45 a.m.	D.C. Transit	Commercial	30 seconds
6:48 a.m.	Riggs National Bank	Commercial	60 seconds
6:53 a.m.	Eastern Air Lines	Commercial	60 seconds
6:54 a.m.	Manischewitz Wine	Commercial	60 seconds
6:59 a.m.	Washington Baking Products	Commercial	60 seconds
7:01 a.m.	Kilson's Import Cookies	Commercial	60 seconds
7:06 a.m.	TWA	Commercial	60 seconds
7:08 a.m.	Lipton Tea	Commercial	60 seconds
7:14 a.m.	Dermasage Skin Lotion	Commercial	30 seconds
7:15 a.m.	Atlantic-Richfield	Commercial	30 seconds
7:20 a.m.	Plymouth	Commercial	60 seconds
7:25 a.m.	J. Blaise de Sibour Insurance	Commercial	60 seconds
7:27 a.m.	Pepperidge Farm Rolls	Commercial	60 seconds
7:30 a.m.	Sears	Commercial	30 seconds
7:32 a.m.	National Bank of Washington	Commercial	10 seconds
7:33 a.m.	Allegheny Air System	Commercial	60 seconds
7:40 a.m.	Mortite Weather Stripping	Commercial	60 seconds
7:38 a.m.	Dick Burton Chevrolet	Commercial	60 seconds
7:45 a.m.	General Motors	Commercial	30 seconds
7:46 a.m.	Grand Union	Commercial	30 seconds
7:48 a.m.	Delta Air Lines	Commercial	60 seconds
7:53 a.m.	Duracell Batteries	Commercial	60 seconds

TIME	ADVERTISEMENT	TYPE	
7:55 a.m.	Sheehy Ford	Commercial	60 seconds
7:59 a.m.	Carling Black Label Beer	Commercial	60 seconds
8:05 a.m.	Swiss Air	Commercial	60 seconds
8:09 a.m.	Hecht Company	Commercial	60 seconds
8:13 a.m.	Giant Foods	Commercial	60 seconds
8:17 a.m.	L.P. Steuart (Chrys/Ply)	Commercial	60 seconds
8:21 a.m.	United Airlines	Commercial	10 seconds
8:24 a.m.	United Airlines	Commercial	60 seconds
8:25 a.m.	Drug Fair	Commercial	60 seconds
8:28 a.m.	D.C. Transit	Commercial	45 seconds
8:30 a.m.	PEPCO	Commercial	60 seconds
8:36 a.m.	Bryce Mountain Land Devel	Commercial	75 seconds
8:38 a.m.	Woodward & Lothrop	Commercial	60 seconds
8:44 a.m.	LaChatalaine Restaurant	Commercial	30 seconds
8:45 a.m.	Chicken of the Sea Tuna	Commercial	30 seconds
8:49 a.m.	Ford	Commercial	60 seconds
8:53 a.m.	Duracell Batteries	Commercial	60 seconds
8:54 a.m.	Japan Airlines	Commercial	60 seconds
8:59 a.m.	AMOCO Gasoline	Commercial	45 seconds
9:02 a.m.	Bayer Aspirin	Commercial	30 seconds
9:02 a.m.	Camfofenique (Medicine)	Commercial	30 seconds
9:06 a.m.	General Foods	Commercial	60 seconds
9:08 a.m.	General Motors	Commercial	60 seconds
9:11 a.m.	Chateau Champlaine Hotel	Commercial	45 seconds
9:15 a.m.	WTOP-TV	Station Promotion	30 seconds
9:16 a.m.	Diet-Pepsi	Commercial	30 seconds
9:18 a.m.	Hecht Company	Commercial	75 seconds
9:23 a.m.	BOAC	Commercial	60 seconds
9:25 a.m.	Charcoal Hearth Restaurant	Commercial	60 seconds

TIME	ADVERTISEMENT	TYPE	
9:28 a.m.	TV-7 News	Commercial	75 seconds
9:29 a.m.	Grand Union	Commercial	30 seconds
9:30 a.m.	Dannon Yogurt	Commercial	60 seconds
9:36 a.m.	Perpetual Savings	Commercial	60 seconds
9:38 a.m.	Eastern Airlines	Commercial	60 seconds
9:42 a.m.	Griffith Fuel Oil	Commercial	60 seconds
9:45 a.m.	Sears	Commercial	60 seconds
9:48 a.m.	Washington Post	Commercial	60 seconds
9:53 a.m.	TV-9	Station Promotion	30 seconds
9:54 a.m.	Gesundheit Restaurant	Commercial	60 seconds
9:58 a.m.	Chrysler	Commercial	60 seconds
10:02 a.m.	Campbell's Soups	Commercial	60 seconds
10:06 a.m.	Danka Pastries	Commercial	60 seconds
10:10 a.m.	Youth Opportunity Center	Public Service	60 seconds
10:15 a.m.	Sears	Commercial	60 seconds
10:16 a.m.	WTOP Community Bulletin Board	Public Service	30 seconds
10:16 a.m.	Chicken o' the Sea Tuna	Commercial	30 seconds
10:18 a.m.	Sheehy Ford	Commercial	60 seconds
10:24 a.m.	Washington Flour	Commercial	60 seconds
10:25 a.m.	Lipton Tea	Commercial	60 seconds
10:30 a.m.	TV-7 News	Commercial	15 seconds
10:32 a.m.	Chateau Champlain Hotel	Commercial	60 seconds
10:37 a.m.	Manischewitz Wines	Commercial	60 seconds
10:39 a.m.	Chrysler	Commercial	60 seconds
10:45 a.m.	Griffith Fuel Oil	Commercial	60 seconds
10:47 a.m.	Bounty Stew	Commercial	60 seconds
10:52 a.m.	Caffree Coffee	Commercial	60 seconds
10:54 a.m.	Charcoal Hearth Restaurant	Commercial	60 seconds
10:58 a.m.	Dannon Yogurt	Commercial	60 seconds

TIME	ADVERTISEMENT	TYPE	
11:03 a.m.	Bayer Aspirin	Commercial	60 seconds
11:06 a.m.	World Book Encyclopedia	Commercial	60 seconds
11:10 a.m.	Campbell's Soup	Commercial	30 seconds
11:12 a.m.	Sears	Commercial	60 seconds
11:15 a.m.	Sears	Commercial	60 seconds
11:17 a.m.	Community Bulletin Board	Public Service	60 seconds
11:19 a.m.	Campbell's Soup	Commercial	60 seconds
11:23 a.m.	Emergency Broadcast Test	Public Service	15 seconds
11:24 a.m.	Caffree Coffee	Commercial	60 seconds
11:30 a.m.	BOAC	Commercial	30 seconds
11:31 a.m.	Deer Mt. Spring Water	Commercial	30 seconds
11:33 a.m.	Bounty Stew	Commercial	60 seconds
11:37 a.m.	Hecht Company	Commercial	60 seconds
11:39 a.m.	Carling Black Label Beer	Commercial	60 seconds
11:45 a.m.	D.C. Transit	Commercial	30 seconds
11:47 a.m.	D.C. Transit	Commercial	30 seconds
11:55 a.m.	Montgomery Center Office Bldg.	Commercial	60 seconds
11:56 a.m.	Woodward & Lothrop	Commercial	60 seconds
12:00 p.m.	Peacock Wine	Commercial	60 seconds
12:03 p.m.	Bayer Aspirin	Commercial	60 seconds
12:10 p.m.	Campbell's Soup	Commercial	30 seconds
12:11 p.m.	AMOCO Gasoline	Commercial	30 seconds
12:16 p.m.	Bounty Stew	Commercial	30 seconds
12:16 p.m.	Community Bulletin Board	Public Service	60 seconds
12:19 p.m.	Bryce Mountain Land Devel	Commercial	60 seconds
12:25 p.m.	Charcoal Hearth Restaurant	Commercial	30 seconds
12:26 p.m.	Ted Lewis Shop	Commercial	60 seconds
12:29 p.m.	Dermasage Skin Lotion	Commercial	60 seconds

TIME	ADVERTISEMENT	TYPE	
12:30 p.m.	Christian Brothers Wine	Commercial	60 seconds
12:31 p.m.	Duracel	Commercial	60 seconds
12:37 p.m.	Hecht Company	Commercial	60 seconds
12:39 p.m.	Perpetual Building Association	Commercial	60 seconds
12:45 p.m.	D.C. Transit	Commercial	30 seconds
12:48 p.m.	Safeway	Commercial	30 seconds
12:49 p.m.	Campbell's Soup	Commercial	30 seconds
12:52 p.m.	Danka Pastry	Commercial	30 seconds
12:53 p.m.	Deer Mt. Park Spring Water	Commercial	60 seconds
12:54 p.m.	Bounty Stew	Commercial	45 seconds
12:55 p.m.	Consumer Gripes	Public Service	60 seconds
12:58 p.m.	Hecht Company	Commercial	60 seconds
1:05 p.m.	Auto Test with Clock	Public Service	60 seconds
1:09 p.m.	Future Attraction	Station Promotion	30 seconds
1:10 p.m.	Grand Union	Commercial	30 seconds
1:14 p.m.	Christian Brothers Wine	Commercial	30 seconds
1:15 p.m.	Community Bulletin Board	Public Service	45 seconds
1:15 p.m.	National Bank of Washington	Commercial	15 seconds
1:16 p.m.	Consumer Hints	Public Service	60 seconds
1:17 p.m.	L.P. Steuart (Chry/Ply)	Commercial	60 seconds
1:23 p.m.	Pepperidge Farm Bread	Commercial	60 seconds
1:25 p.m.	Brite Co. (Renuit Paint)	Commercial	60 seconds
1:29 p.m.	Chateau Champlain Hotel	Commercial	30 seconds
1:29 p.m.	D.C. Transit	Commercial	15 seconds
1:31 p.m.	Brite Co. (Renuit Paint)	Commercial	60 seconds
1:37 p.m.	Brite Co. (Renuit Paint)	Commercial	60 seconds
1:39 p.m.	Hecht Company	Commercial	60 seconds
1:45 p.m.	Bounty Stew	Commercial	60 seconds

TIME	ADVERTISEMENT	TYPE	
1:46 p.m.	Central Charge	Commercial	30 seconds
1:50 p.m.	Giant Food	Commercial	60 seconds
1:53 p.m.	Washington Post	Commercial	60 seconds
1:55 p.m.	Maryland National Bank	Commercial	60 seconds
1:59 p.m.	CITGO Gasoline	Commercial	45 seconds
2:03 p.m.	Burlington Mills	Commercial	30 seconds
2:06 p.m.	Radio Free Europe	Commercial	60 seconds
2:09 p.m.	Future Attractions	Station Promotion	60 seconds
2:15 p.m.	Christian Brothers Wine	Commercial	30 seconds
2:15 p.m.	Community Bulletin Board	Public Service	60 seconds
2:18 p.m.	J. Blaise de Sibour Insurance	Commercial	60 seconds
2:23 p.m.	National Bank of Washington	Commercial	60 seconds
2:23 p.m.	Monarch Wine Importers	Commercial	45 seconds
2:30 p.m.	Safeway	Commercial	30 seconds
2:31 p.m.	Sears	Commercial	30 seconds
2:32 p.m.	Kelson Danish Cookies	Commercial	60 seconds
2:38 p.m.	Kaplan Crawford Dodge	Commercial	60 seconds
2:40 p.m.	Woodward & Lothrop	Commercial	60 seconds
2:44 p.m.	Chicken o' the Sea Tuna	Commercial	30 seconds
2:46 p.m.	Danka Pastry	Commercial	30 seconds
2:49 p.m.	Give to College of Choice	Public Service	45 seconds
2:53 p.m.	Hecht Company	Commercial	60 seconds
2:55 p.m.	Bounty Stew	Commercial	60 seconds
2:59 p.m.	Dermasage Skin Lotion	Commercial	60 seconds
3:03 p.m.	Danka Pastry	Commercial	30 seconds
3:06 p.m.	Campbell Soup	Commercial	30 seconds
3:08 p.m.	Future Attraction	Station Promotion	30 seconds
3:10 p.m.	WTOP-TV	Station Promotion	10 seconds
3:14 p.m.	National Bank of Washington	Commercial	15 seconds
3:14 p.m.	D.C. Transit	Commercial	30 seconds

TIME	ADVERTISEMENT	TYPE	
3:19 p.m.	World Book Encyclopedia	Commercial	60 seconds
3:24 p.m.	Delta Air Lines	Commercial	50 seconds
3:29 p.m.	Sears	Commercial	30 seconds
3:29 p.m.	WTOP-TV	Station Promotion	30 seconds
3:30 p.m.	Charcoal Hearth Restaurant	Commercial	60 seconds
3:38 p.m.	L.P. Steuart Company	Commercial	60 seconds
3:39 p.m.	UGF	Public Service	60 seconds
3:45 p.m.	Central Charge-a-Card	Commercial	30 seconds
3:46 p.m.	Pepsi-Cola	Commercial	30 seconds
3:47 p.m.	Burlington Mills	Commercial	30 seconds
3:50 p.m.	United Van Lines	Commercial	60 seconds
3:53 p.m.	Gesundheit Restaurant	Commercial	60 seconds
3:54 p.m.	Hecht Company	Commercial	60 seconds
3:55 p.m.	Consumer Gripes	Public Service	60 seconds
3:58 p.m.	Washington Post	Commercial	60 seconds
4:02 p.m.	Bayer Aspirin	Commercial	60 seconds
4:04 p.m.	World Book Encyclopedia	Commercial	30 seconds
4:08 p.m.	General Motors	Commercial	60 seconds
4:09 p.m.	D.C. Transit	Commercial	30 seconds
4:14 p.m.	Sears	Commercial	30 seconds
4:15 p.m.	Simca/Fairfax Chry/Ply	Commercial	15 seconds
4:17 p.m.	La Chatelaine Restaurant	Commercial	60 seconds
4:24 p.m.	National Savings & Trust Co.	Commercial	60 seconds
4:25 p.m.	STP Oil Company	Commercial	60 seconds
4:28 p.m.	Grand Union	Commercial	30 seconds
4:29 p.m.	Christian Brothers Wine	Commercial	30 seconds

TIME	ADVERTISEMENT	TYPE	
4:31 p.m.	BOAC	Commercial	60 seconds
4:38 p.m.	RCA	Commercial	60 seconds
4:40 p.m.	World Book Encyclopedia	Commercial	30 seconds
4:42 p.m.	Dr. Scholl's Foot Deo.	Commercial	60 seconds
4:46 p.m.	Washington Post	Commercial	30 seconds
4:47 p.m.	National Bank of Washington	Commercial	60 seconds
4:52 p.m.	Ford	Commercial	60 seconds
4:54 p.m.	TWA	Commercial	60 seconds
4:58 p.m.	Hecht Company	Commercial	60 seconds
5:03 p.m.	Vise Grip	Commercial	60 seconds
5:06 p.m.	General Motors	Commercial	60 seconds
5:09 p.m.	"More-Tight" Weather Stripping	Commercial	60 seconds
5:11 p.m.	AMOCO Gasoline	Commercial	30 seconds
5:15 p.m.	Christian Brothers Wine	Commercial	30 seconds
5:16 p.m.	Chateau Champlain Hotel	Commercial	30 seconds
5:18 p.m.	Duracell Batteries	Commercial	60 seconds
5:26 p.m.	United Airlines	Commercial	60 seconds
5:28 p.m.	Giant Food	Commercial	60 seconds
5:29 p.m.	TV-7 News	Commercial	15 seconds
5:32 p.m.	"Stay in School"	Public Service	15 seconds
5:33 p.m.	Drug Fair	Commercial	60 seconds
5:36 p.m.	Satellite (Metro. Chrysler)	Commercial	60 seconds
5:37 p.m.	Danish Butter Cookies	Commercial	60 seconds
5:45 p.m.	Safeway	Commercial	45 seconds
5:46 p.m.	Japan Airlines	Commercial	60 seconds
5:52 p.m.	Maxwell House Coffee	Commercial	60 seconds
5:53 p.m.	Bryce Mountain Land Devel.	Commercial	60 seconds
5:59 p.m.	Gesundheit Restaurant	Commercial	60 seconds
6:00 p.m.	Dangerous Play Things	Public Service	60 seconds
6:07 p.m.	Manischewitz Wine	Commercial	60 seconds

TIME	ADVERTISEMENT	TYPE	
6:10 p.m.	Giant Food	Commercial	60 seconds
6:15 p.m.	Central Charge-a-Card	Commercial	30 seconds
6:16 p.m.	Carling Black Label Beer	Commercial	60 seconds
6:25 p.m.	Ray-o-Vac Battery	Commercial	60 seconds
6:27 p.m.	RCA	Commercial	60 seconds
6:29 p.m.	TV-7 News	Commercial	60 seconds
6:30 p.m.	Washington Post	Commercial	60 seconds

AFFIDAVIT

I, Joanne S. Blankespoor, being duly sworn state as follows:

1. I am competent to make this affidavit and have personal knowledge of the facts set forth herein.

2. I reside at 5238 Baltimore Avenue, Washington, D. C.

3. On the morning of Friday, November 13, 1970, I listened to WTOP-AM, 150 on the dial, from 9:30 a.m. to 12:30 p.m. continuously and without interruption.

4. During the three hour period, I listed every advertisement, what time it was broadcast and for what duration.

5. To the best of my knowledge, the information contained in my report represents an accurate and complete log of advertisements broadcast during the 9:30 a.m. to 12:30 p.m. time period.

Joanne S. Blankespoor

Joanne S. Blankespoor

Sworn and subscribed before me, a Notary Public in and for the District of Columbia, this 13 day of November, 1970.

NOTARY PUBLIC

My Commission Expires Sept. 30, 1975

AFFIDAVIT

I, Judith Turnock, being duly sworn state as follows:

1. I am competent to make this affidavit and have personal knowledge of the facts set forth herein.

2. I reside at 1742 Riggs Place, N. W., Washington, D. C.

3. On the morning of Friday, November 13, 1970, I listened to WTOP-AM radio, 150 on the dial, from 6:30 a.m. to 9:30 a.m. continuously and without interruption.

4. During the three hour period, I listed every advertisement, what time it was broadcast and for what duration.

5. To the best of my knowledge, the information contained in my report represents an accurate and complete log of advertisements broadcast during the 6:30 a.m. to 9:30 a.m. time period.

Judith Turnock

Sworn and subscribed before me, a Notary Public in and for the District of Columbia, this th day of November, 1970.

NOTARY PUBLIC

My Commission Expires Sept. 30, 1973

AFFIDAVIT

I, Patsy M. Smith, being duly sworn, state as follows:

1. I am competent to make this affidavit and have personal knowledge of the facts set forth herein.

2. I reside at 7303 Idylwood Court, Falls Church, Virginia.

3. On the afternoon of Friday, November 13, 1970, I listened to WTOP-AM, 150 on the dial, from 4:30 p.m. to 6:30 p.m. continuously and without interruption.

4. During the two hour period, I listed every advertisement, what time it was broadcast and for what duration.

5. To the best of my knowledge, the information contained in my report represents an accurate and complete log of advertisements broadcast during the 4:30 p.m. to 6:30 p.m. time period.

Patsy M. Smith

Patsy M. Smith

Sworn and subscribed before me, a Notary Public in and for the Commonwealth of Virginia, this 21 day of November, 1970.

Notary Public

AFFIDAVIT

I, Nathalie O. Post, being duly sworn, state as follows:

1. I am competent to make this affidavit and have personal knowledge of the facts set forth herein.

2. I reside at 7213 Idylwood Court, Falls Church, Virginia.

3. On the afternoon of Friday, November 13, 1970, I listened to WTOP-AM, 150 on the dial, from 12:30 p.m. to 4:30 p.m. continuously and without interruption.

4. During the two hour period, I listed every advertisement, what time it was broadcast and for what duration.

5. To the best of my knowledge, the information contained in my report represents an accurate and complete log of advertisements broadcast during the 12:30 p.m. to 4:30 p.m. time period.

Nathalie O. Post

Sworn and subscribed before me, a Notary Public in and for the Commonwealth of Virginia, this 21 day of November, 1970.

Notary Public

The non-stop news of WTOP Radio.

The year Washington D.C. got some great news.

Non-stop audience growth.

WTOP audience growth has not only been *dramatic* but *consistent*.
In the year April/May 1969 to April/May 1970 WEEKLY CUME FOR PERSONS 12+ HAS INCREASED **16%** from 370,600 in 1969 to 429,600 in 1970.
This is the **fastest growth rate** of **any Washington radio station.**

How we got going—non-stop.

Making the news could well be called Washington's biggest industry. Here, in the news capital of the world, newsmakers—The President, The Congress, Cabinet and other governmental officials, both local and federal, initiate and enact policies that affect not only the country but the world.

In Washington, more than in any other American city, there was a real demand for a comprehensive all-news radio station, a source of instant news for news-hungry Washingtonians.

Because we knew that no other medium can react as rapidly as radio to changing events, and because we felt a responsibility to our community to fill an important gap in news reporting, WTOP inaugurated in 1969, our "non-stop news" format . . . giving Washingtonians all the news they want any time they want it.

It was a gamble—we knew it. But our commitment to more and better news coverage turned out to be the best news to hit Washington in years . . . for WTOP, for Washingtonians and for advertisers, too.

Our role... our responsibility.

Deciding to go "all-news" meant going all out. And with it came added responsibility. What could we do to contribute to our audience's understanding of news events—particularly when Washington listeners are so sophisticated about news reporting? With the time and the facilities to explore the great potential of radio as a news medium, we were determined to be more than an echo of wire services and news tickers. Our staff was expanded to 70 journalists —the largest in Washington.

Their job: to search for the trends, meaning, causes and relevance of all news events; to transmit, concisely and clearly, every report from City Hall to Cambodia. This staff and the entire CBS News team went to work. Listeners began to turn to us more and more for intelligence and insight. They made **WTOP the fastest growing radio station in Washington.**

What's news anyway?

What's news is what interests people—all kinds of people. At WTOP Radio, we cover the interests of Washingtonians non-stop. Our staff of inventive journalists, under the direction of 20-year veteran Jim Snyder, has covered stories from the men-vs.-midi skirts to the campus-vs.-the-cops phenomenon. WTOP listeners depend on us for all their news. They get:

Weather Reports—Every Seven Minutes

Sports News—Every Half-Hour

Business News—Six Times Each Day

Stock Market Reports—Four Times Each Day

News Headlines—Three Times Every Hour

Traffic Reports—Four Times Per Hour, Morning and Evening

Even more than exceptional hard news coverage, we offer commentary and special in-depth studies.

- Rich Adams speaks from the ghetto to the community
- Carolyn Lewis covers Capitol Hill
- Doug Llewelyn looks at the light side of news
- Warner Wolf rhapsodizes about sports.
- Bob Dalton interprets stock-market gyrations
- Davey Marlin-Jones reviews theatre and cinema
- Ann Taylor keeps up with consumer concerns
- The WTOP "Trouble Shooter" solves listeners' problems
- And the added "Dimension" of CBS News scans the globe

Commentary is an important part of our news coverage. We not only report the news, but also analyze it. And from *many differing viewpoints*. The always stimulating, often feisty opinions of **James J. Kilpatrick;** the wide-ranging opinions of **Carl Rowan;** the observations of **Frank Mankiewicz** and **Tom Braden,** with tongue-in-cheek jabs at all portions of the political spectrum; and **Earl Mazo** keeps a trained eye on the Administration. Listeners get a story from all sides—including our own—in hard-hitting editorials.

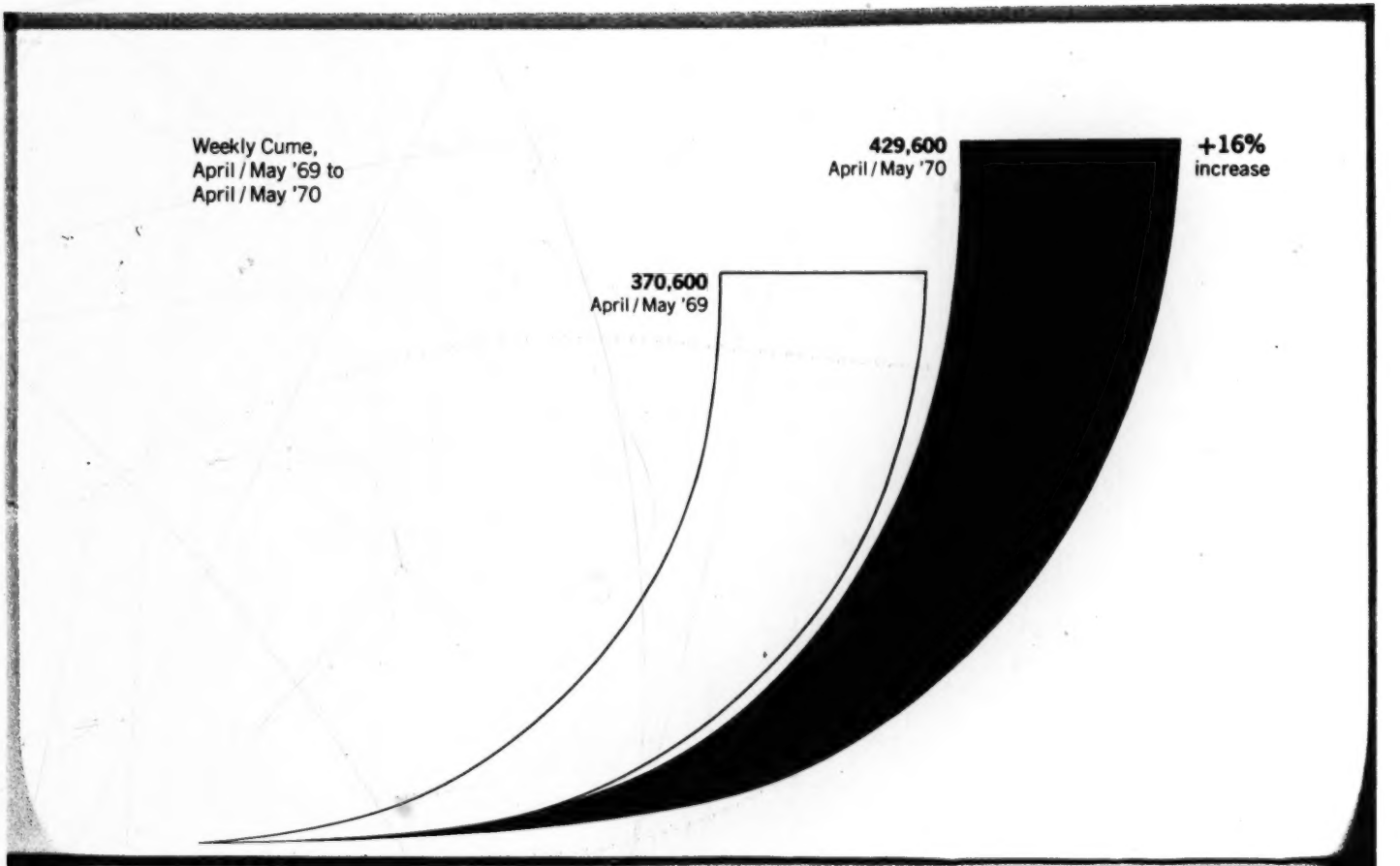
Excitement interests people. And more and more people are interested in WTOP Radio. No wonder we're the fastest growing radio station in Washington.

Community-minded news.

WTOP's dedication to our community goes beyond even news coverage and commentary. We've been crusading some, too. The problems of our community, like those of any growing metropolis, need investigation, discussion, dissection, and criticism. The WTOP news team delves into these issues—the skyrocketing cost of living, the educational environment, home-rule, drugs and the children. We talk to authorities, citizens, to everyone involved and we draw conclusions. We also get results.

WTOP correspondent George Allen made an in-depth study of the difficulties of the District Health Department. His report started with the problems of providing proper care to all of Washington's needy citizens. It ended with the reorganization of the Health Department and a new resolution by the Mayor to see that health matters were more carefully and efficiently handled. Out of WTOP's investigations came government action. We're proud of that.

We're involved in Washington. And Washington is involved with us . . . more and more often, in greater and greater numbers. WTOP Radio 150 is moving ahead—non-stop. As proof, **More members of Congress regularly listen to WTOP than to any other radio station.**

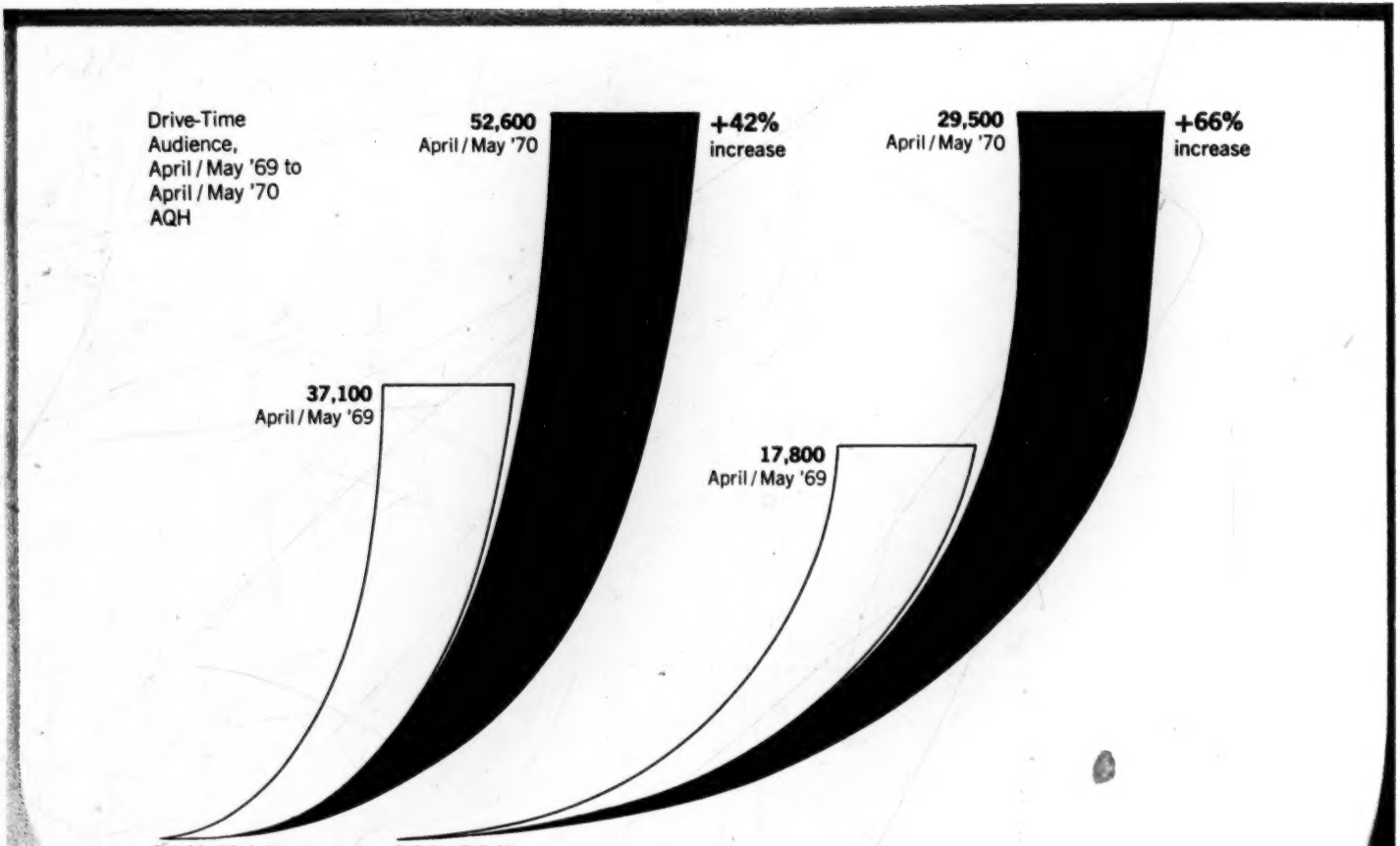

Weekly Cume,
April / May '69 to
April / May '70
429,600
April / May '70
+16%
increase
370,600
April / May '69

Dramatic drive-time gains.

Audience habits and loyalties are not easily changed. That makes drive-time competition particularly tough. But even in the difficult drive time hours, WTOP can show *consistent* and *significant* growth.

The April/May 1970 ARB Survey show that:
In an average quarter-hour, Monday-Friday—
6:00-10:00 A.M. LISTENERSHIP OF PERSONS 12+ INCREASED **42%** from 37,100 in 1969 to 52,600 in 1970.
3:00-7:00 P.M. LISTENERSHIP OF PERSONS 12+ INCREASED **66%** from 17,800 in 1969 to 29,500 in 1970.

More people are listening to WTOP more often. Think what that means to you when you have a message to present!


Drive-Time
Audience,
April / May '69 to
April / May '70
AQH
52,600
April / May '70
+42%
increase
37,100
April / May '69
29,500
April / May '70
+66%
increase
17,800
April / May '69

Are women interested in non-stop news?

Our first year shattered long-standing notions about women's interest in news—particularly in all-news programming.

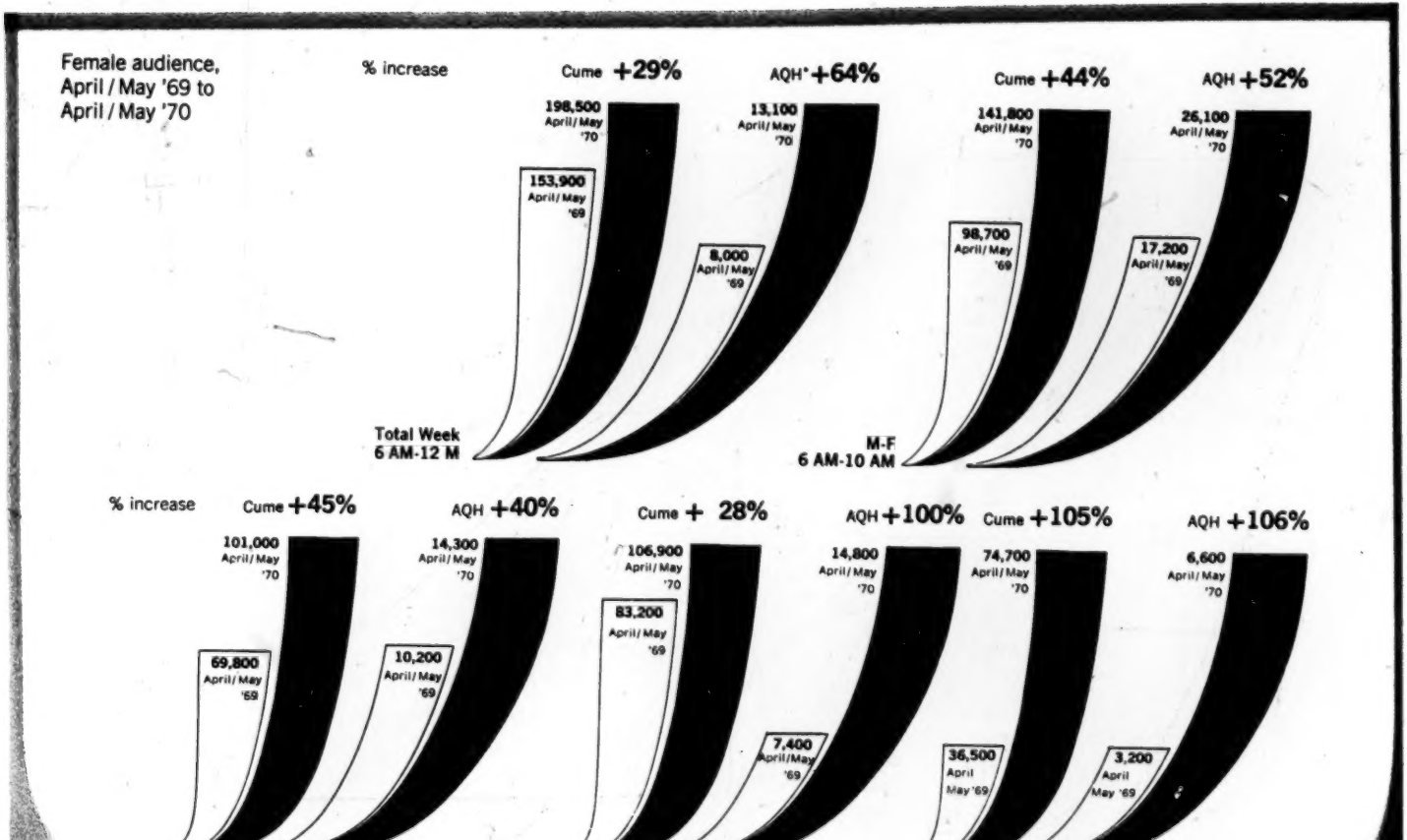
Why? Because through a series of unique approaches we invited them to listen.

Note the dramatic gains in total week female audience.

As a result In **every survey time period,** more women are listening to WTOP Radio.

Female listenership on WTOP Radio, according to the April/May 1970 ARB Survey, *has increased* as follows:

Total Week **+45%**
Daytime
10 A.M. to 3 P.M. **+80%**
Early Morning
6 A.M. to 10 A.M. **+6%**
Early Evening
3 P.M. to 7 P.M. **+48%**
Late Evening
7 P.M. to Midnight **+51%**


Female audience,
April / May '69 to
April / May '70
% increase
Cume +29%
AQH* +64%
198,500 April/ May '70
153,900 April/ May '69
13,100 April/ May '70
8,000 April/ May '69
Total Week
6 AM-12 M
Cume +44%
AQH +52%
141,800 April/ May '70
98,700 April/ May '69
26,100 April/ May '70
17,200 April/ May '69
M-F
6 AM-10 AM
% increase
Cume +45%
AQH +40%
101,000 April/ May '70
69,800 April/ May '69
14,300 April/ May '70
10,200 April/ May '69
Cume + 28%
AQH +100%
106,900 April/ May '70
83,200 April/ May '69
14,800 April/ May '70
7,400 April/ May '69
Cume +105%
AQH +106%
74,700 April/ May '70
36,500 April May '69
6,600 April/ May '70
3,200 April May '69

The involved audience.

WTOP non-stop news is not soothing syrup. Listeners deliberately *select it* on their dials, deliberately listen to it, react to it, become *involved* with it.

For advertisers, WTOP has built *a new audience* in the Washington market—a massive audience that *listens*. Within this audience, advertisers will find more than one "public". All are in the market for your products or services. Important segments, with special kinds of Washington interests, will open their minds to your special messages or campaigns which speak to large public issues.

The year Washington, D.C. got some great news was also the year advertisers got some great news.

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Supreme Court of the United States

October Term, 1972

No. 71-863

COLUMBIA BROADCASTING SYSTEM, INC.,
Petitioner,
v.
DEMOCRATIC NATIONAL COMMITTEE, *et al.*,

No. 71-864

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,
v.
BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, *et al.*,

No. 71-865

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
Petitioner,
v.
BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, *et al.*,

No. 71-866

AMERICAN BROADCASTING COMPANIES, INC.,
Petitioner,
v.
DEMOCRATIC NATIONAL COMMITTEE, *et al.*,

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus*, in support of the position of the Democratic National Committee and the Business Executives' Move for Vietnam Peace, is filed by the American

Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 115 national and international labor unions having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

As the leading reported cases from *United Broadcasting Co.*, 10 F.C.C. 515, through *Retail Store Employees Union* v. *FCC*, 436 F. 2d 248 (C.A.D.C.) indicate, the labor movement has continuously sought, and been continuously denied, the opportunity to utilize broadcast advertising time to reach the public on controversial issues of public importance. It is for this reason that the AFL-CIO wishes to take this opportunity to acquaint this Court with its views on the issues presented in the instant cases.

ARGUMENT

1. "Broadcast licensees . . . serve . . . as 'speakers'. . . in normal programming time" during which they air, *inter alia*, "news and documentary presentations" which they "closely edit and control" (A. 464) and which, therefore, express their considered judgments as broadcast journalists. Licensees also "open up" the airwaves "for direct broadcast presentations by members of the public." A. 475. They sell time to third persons for "advertising purposes"; these advertisements are "nonprogram material" to use Commissioner Cox's suggestive phrase. A. 369. As to this advertising time, broadcasters "serve not . . . as speakers . . . but as administrators of a highly valuable communications resource." A. 464. While licensees are required by the Federal Communications Commission to retain a resid-

ual measure of control over advertisements "to protect the public" from "deceptive or misleading advertisements" (*Center for Law and Social Policy*, 23 P. & F. Radio Regulation 2d 187, 195) it is recognized by all that the purpose of "nonprogram material" is to state the sponsor's views, and that it is not a product of the broadcaster's journalistic judgment. Clearly the decision to cut from a news report to advertisements "for soaps, brassieres, deodorants, and mouthwashes" (A. 250) reflects an economic rather than an editorial choice.

In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 386, this Court disapproved the broadcasters' pretentions "to use their allotted frequencies continuously to broadcast whatever they choose and to exclude whomever they choose from using that frequency." *Red Lion* involved program time as to which "the broadcasters own interests in free speech are very very strong." A. 464-465. The instant case, in contrast, involves only the "allocation of advertising time" as to which "the broadcasters themselves have no substantial First Amendment interest" (A. 465), if indeed they have any at all. Compare *Valentine* v. *Chrestensen*, 316 U.S. 52. Nevertheless, here, once again, a claim of right "to exclude whomever [the broadcasters] choose," in this instance through "a flat ban on paid public issue announcements" (A. 449), is the heart of Petitioners' case. And here, as in *Red Lion*, this claim must be rejected if the purposes of the Communications Act and the promise of the First Amendment are to be fulfilled.

The Government argues that the question presented in the instant case is:

"Whether, under the powers granted to it by the

> Federal Communications Act, and in light of the inherent limitations on the broadcast spectrum, the Federal Communications Commission, which under its 'Fairness Doctrine' requires broadcast licensees to present programming involving controversial issues of public importance, must, because of the First Amendment, also require that the licensees sell time to individuals and groups for the advertising of their particular views." Gov. Br. p. 2.

This misstates the question before the Court unless it is amended as follows:

> "Whether, under the powers granted to it by the Federal Communications Act, and in light of the inherent limitations on the broadcast spectrum, the Federal Communications Commission, which under its 'Fairness Doctrine' requires broadcast licensees to present programming involving controversial issues of public importance, must, because of the First Amendment, also require that the licensees *who elect to sell time to third persons to advertise goods and services must also* sell *some nonprogram* time to individuals and groups for the advertising of their particular views *on controversial issues of public importance.*" (Our additions in italics).

For the issue here is not whether broadcasters shall be restricted by rules other than the Fairness Doctrine with respect to program time; it is whether they may constitutionally be permitted to discriminate against speech on issues of public importance during advertising time. Thus the Government's artful phrasing of the question poses a false dichotomy between the rights of broadcasters to make their own programming decisions and the rights of non-licensees who wish to broadcast public issue announcements. But the real conflict is between the right of broadcasters to

sell advertising time on any basis that suits their convenience and their obligation to do so in a manner consistent with the values embodied in the First Amendment.

The court below correctly understood this to be the issue. It held that in light of the overall plan of the Communications Act, the Government has a duty to secure broadcaster compliance with the mandate of the Constitution in their handling of advertising time. And, applying First Amendment standards, which none of the Petitioners dispute, the lower court held that the Commission must promulgate rules and regulation which prohibit licensees from discriminating against "editorial" advertisements, which the First Amendment is designed to protect and further (*New York Times* v. *Sullivan*, 376 U.S. 254), in favor of "purely commercial advertisements" which do not come within the protective ambit of that Amendment (*Valentine* v. *Chrestensen*, 316 U.S. 52). In the words of the court below, the "*extreme* form of . . . [licensee] control in . . . the sale of advertising time . . . which totally excludes controversial public debate from [that] time . . . when other sorts of paid announcements are accepted . . . is in violation of the First Amendment" (A. 449, emphasis in the original), and the Commission is, therefore, required to "develop reasonable regulatory guidelines to deal with editorial advertisements" (A. 448). In remanding for further proceedings, the lower court took pains to assure the Commission "broad latitude to develop 'reasonable regulations' which will avoid any possibility of chaos and confusion." A. 484. The limited and measured steps taken by the court below are the absolute minimum required to harmonize the Communications Act, as elaborated by the Commission's

rulings and regulations, with the requirements of the Constitution. For *New York Times* and *Valentine* v. *Chrestensen* make it plain that to allow the complete subordination of the right to present controversial public issue advertisements to the right to present purely commercial advertisements is to invert the free speech values embodied in the Constitution. And this Court's decision in *Red Lion*, by establishing that it is the "collective right" of the "people as a whole" to have the radio and television media "function consistently with the ends and purposes of the First Amendment" (395 U.S. at 389), has removed all doubt "that the First Amendment . . . has a major role to play . . . [in the regulation of] public broadcasting" (*ibid*).

2. "Free and unhindered debate on matters of public importance [is] the core value of the Free Speech Clause of the First Amendment." *Pickering* v. *Board of Education*, 391 U.S. 563, 573. The right to take part in that debate is accorded to all citizens, not a chosen few. "That Amendment rests on the assumption that the widest possible dissemination of the information from diverse and antagonistic sources is essential to the welfare of the public. . . . Freedom to publish means freedom for all and not for some." *Associated Press* v. *United States*, 326 U.S. 1, 20. This freedom is a "fundamental personal right . . . of the lonely pamphleteer . . . as much as of the large metropolitan publishers . . . [it] is not confined to newspapers and periodicals." *Branzburg* v. *Hayes*, ... *U.S.* ....., 40 L.W. 5025, 5037. By the same token, within wide limits (see, e.g., *Valentine* v. *Chrestensen*, 316 U.S. 52), the Constitution provides no hierarchy which assigns a higher value to certain forms of free speech than to others. "The constitutional

protection does not turn upon 'the truth, popularity or social utility of the ideas and beliefs which are offered'." *New York Times*, 376 U.S. at 271. "That is why '[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons'." *Cohen* v. *California*, 403 U.S. 15, 25. "Our profound national commitment to [these] principle[s]" (*New York Times*, 376 U.S. at 270) rests on the basis that:

> "The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen* v. *California*, 403 U.S. at 24.

As a general proposition then, it is indisputable that "our people are guaranteed the right to express any thought, free from government censorship, [t]he essence [of which] is content control," and that the Government "may neither select which issues are worth discussing or debating in public facilities" nor practice a policy of "selective exclusions [of speakers] from a public forum . . . justified by reference to content alone." *City of Chicago* v. *Mosley*, ... U.S. ....., 40 L.W. 4877, 4878.

This principle is not absolute, however. "Conflicting demands on the same place may compel the State to make choices among potential users and uses." *Id.* at 4879. Where there are more who wish to express their views than a particular medium can accommodate, governmental rules

of allocation to govern that scarce communications resource are not *per se* violations of the First Amendment even though they still the voices of all but "a tiny fraction of those with the [desire, the] resources, and intelligence to communicate [on that medium] at the same time." *Red Lion,* 395 U.S. at 388. In the face of the "massive reality" of scarcity "it is idle to posit an unabridgeable First Amendment right to [speak]." *Id.* at 388. For, absent government regulation, experience has demonstrated that where the demand to speak has exceeded the supply of opportunities to do so, "the result was chaos" in that "the medium [was] of little use because of the cacophony of competing voices." *Id.* at 376. Where scarcity prevails governmental rules of order are, therefore, the *sine qua non* of "intelligible communication." *Id.* at 388. Thus, such rules are not inherently inconsistent with the First Amendment. For "[i]t would be strange if [that] Amendment, aimed at protecting and furthering communications, prevented the Government from making . . . communication possible." *Id.* at 389. In short, Government action which furthers free speech overall is not subject to censure on the bare ground that it requires some who wish to speak to be quiet:

> "No one has ever argued that speech should be free of the restraints of reasonable parliamentary rules . . . speech has always been dependent on some commitment to order and etiquette . . .:
>
> > 'When self-governing men demand freedom of speech they are not saying that every individual has an inalienable right to speak whenever, wherever, however he chooses. They do not declare than any man may talk as he pleases, when he pleases, about what he pleases, about whom he

> pleases, to whom he pleases. The common sense of any reasonable society would deny the existence of that unqualified right'." Kalven, *Cox* v. *Louisiana: The Concept of the Public Forum,* 1965 Supreme Court Review 1, 23-24.

Naturally Congress has a measure of discretion in tailoring the allocational rules it develops to the needs of a particular medium. The proper function of these rules is to set an agenda for "free and unhindered debate on matters of public importance" (*Pickering,* 391 U.S. at 573), and to meet "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas" (*Red Lion,* 395 U.S. at 390), under circumstances in which "it [is] essential for the Government to tell some applicants that they [can] not [speak] at all because there [is] room for only a few" (*id.* at 388). This requires a most sensitive mediation between competing First Amendment claims in a fashion which fairly promotes coherent discussion covering the full range of human concerns and which avoids the rigidities of "authoritative selection" (*Keyishian* v. *Board of Regents,* 385 U.S. 589, 603). Thus there is no single formula which sets the terms on which the process of selection shall be made, and which applies across the board. "Differences in the characteristics of news media justify differences in the First Amendment standards applied to them." *Red Lion,* 395 U.S. at 386.

"The Government," to take one example, "could surely have decreed that each frequency should be shared among all . . . those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week." *Id.* at 390-391. This would be precisely the "reasonable 'time, place and manner' regulation . . . necessary to further sig-

nificant governmental interests," which this Court has "continually recognized" as valid. *Mosley,* 40 L.W. at 4879. At the same time, it was assuredly open to Congress to decide, as it has, to allot the airwaves to licensees who are required "to conduct themselves as a proxy or fiduciary with obligations to present those views and voices which are representative of their community" (*Red Lion,* 395 U.S. at 389), pursuant to a "twofold duty . . . to give adequate coverage to public issues . . . at the broadcastors own expense [and] initiative [if necessary] . . . [which] coverage must be fair in that it accurately reflects opposing views" (*id.* at 377-378), and who, as the court below recognized, are accorded "broad leeway for professional judgment" in carrying out their responsibilities as broadcast journalists (A. 465). For this option, too, serves the public interest in meaningful debate on public issues complemented by coherent and variegated broadcast programming.

But the fact that there is this range of choice does not mean that the legislative authority is wholly at large. "[J]ustification for selective exclusions from a public forum must be . . . tailored to serve a substantial governmental interest . . . and must be carefully scrutinized." *Mosley,* 40 L.W. at 4879. "The right to use a public place [dedicated to communication] for expressive activity may be restricted only for weighty reasons." *Grayned* v. *City of Rockford,* ..... U.S. ....., 40 L.W. 4881, 4882. In essence, rules of order are compatible with the tenets of free speech because they make "intelligible . . . communication possible." *Red Lion,* 395 U.S. at 388, 389. Thus, in testing the validity of any scheme of allocation the basic touchstone is that the regulatory regime must "enhance rather than

abridge the freedom of speech . . . protected by the First Amendment." *Id.* at 375. The course charted by the court below meets this fundamental requirement; the opposite tack taken by the Commission does not.

The lower court's decision increases the amount of "speech concerning public affairs [which] is more than self-expression; it is the essence of self-government" (*Garrison* v. *Louisiana*, 379 U.S. 64, 74-75) derived from "the widest possible dissemination of information from diverse and antagonistic sources" (*Associated Press*, 326 U.S. at 20). Thus it enhances "free and unhindered debate on matters of public importance" (*Pickering*, 391 U.S. at 573), as well as "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas." (*Red Lion*, 395 U.S. at 390). It does so by vindicating "the fundamental personal right" (*Branzburg*, 40 L.W. at 5037) of free expression of non-licensees "who wish to exercise their freedom of speech though they are not members of the press" (*New York Times*, 376 U.S. at 266). This serves to maximize the extent to which "the decision as to what views shall be voiced [is placed] in the hands of each of us" (*Cohen* v. *California*, 403 U.S. at 24), and to diminish licensee power to "monopolize a radio frequency to the exclusion of his fellow citizens" (*Red Lion*, 395 U.S. at 389).

These results, which are, of course, consonant with "the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee" (*Red Lion*, 395 U.S. at 390), are accomplished

without trenching upon any interest of equal stature. For the court below dealt only with the "permissibility of discrimination . . . against 'controversial' speech and in favor of commercial and 'non-controversial' speech . . . within a given block of advertising time . . . that already has been opened up by the licensees themselves for direct broadcast presentations by members of the public." A. 475. It left undisturbed "the licensees basic right to exercise judgment and control in public issue programming" as to which "the broadcasters own interests in free speech are very, very strong" A. 464-465. Thus, the rights subordinated to the interest in expanding the "marketplace of ideas" on the mass media are the right of the broadcaster to sell, and the right of commercial advertisers to buy, advertising time free of government control. But those rights are not within the ambit of protection afforded by the Constitution. *Valentine* v. *Chrestenson*, 316 U.S. 52.

In contrast the Commission's position does "abridge" rather than "enhance" free speech. It limits speech on controversial public issues in the interest of those who wish to broadcast purely commercial messages. This inverts the balance struck by the Constitution. Compare *New York Times*, 376 U.S. at 266, with *Valentine* v. *Chrestenson*, 316 U.S. 52. It is thus outside the range of options open to the Government in promulgating rules of order. For, a "justification for selective exclusions from a public forum must be . . . tailored to serve a substantial government interest." *Mosley*, 40 L.W. at 4879. *New York Times* and *Valentine* v. *Chrestenson* establish that an interest in furthering commercial advertising at the expense of editorial advertising is not a "subordinating interest which is compelling" (*Bates* v. *Little Rock*, 361 U.S. 516, 524). Thus "a flat ban

on paid public issue announcements" (A. 449) in advertising time open to commercial announcements is plainly an impermissible "selective exclusion [of speakers] from a public forum . . . justified by reference to content alone." *Mosley*, 40 L.W. at 4878. And, of course, this misapprehension of what the First Amendment is all about compounds the already substantial difficulties inherent in assuring that the scarce communications resource of the airwaves is utilized in a manner which "give[s] suitable time and attention to matters of great public concern" (*Red Lion*, 395 U.S. at 394). For, depending on the time presently allotted to commercial advertisements, it provides 40 or 50, rather than 60, minute hours for the presentation of the variegated First Amendment speech which the "public" has a "right . . . to receive" (*id.* at 390), despite the fact that the premise of federal regulation is that "even if the entire radio spectrum is utilized . . . there [is] room for only a few" of those "who hope to communicate by radio" (*id.* at 388). Finally, the Commission's view is completely at odds with this Court's admonitions in *Red Lion* that licensees have "no right to an unconditional monopoly of a scarce resource which the government has denied others the right to use" (*id.* at 391), that there is "no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all" (*id.* at 392), and that the "rights of free speech of a broadcaster . . . does not embrace a right to snuff out the free speech of others" (*id.* at 387). For, the Commission's inaction here entrenches the monopoly position of licensees by allowing them to "snuff out" the free speech rights of editorial advertisers through the practice of a clearly unconstitutional form of

"censorship" based on "content alone" (*Mosley*, 40 L.W. at 4878).

3. The broadcasters and the Commission join in arguing that the Communications Act does sanction "a total exclus[ion of] controversial public debate from broadcast advertising time" (A. 449) "in the context of the safeguards that the Fairness Doctrine affords the public" (Gov. Br. p. 40).

But § 315 of the Act "obligat[es]" broadcasters "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." "The 'public interest' in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public." *Red Lion*, 395 U.S. at 385. Section 315, in other words is the statutory expression of Congress's determination that the radio and television media shall be regulated so as to "function consistently with the ends and purposes of the First Amendment" (*id.* at 389). In implementing the commands of that section the Commission is, therefore, mandated to maximize constitutionally protected free speech to the fullest feasible extent.

As already noted (pp. 7-11 *supra*), effectuation of this duty in the area of program time involves the most substantial and sensitive difficulties because it entails choices between competing First Amendment claims. For this reason, or perhaps others, the Fairness Doctrine does not contemplate that licensees will be required to cover any particular issue of public importance, or indeed of the full range of "problems which beset the people" (*Red Lion*, 395 U.S. at 394) to the optimum point. It sets a minimal

standard of broadcast responsibility, leaving to the licensee's "best judgment and good sense" the "subjects that should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view." *Report on Editorializing,* 13 FCC 1249, 1251. Thus, this standard has "taken on effective meaning only in the most extreme cases of broadcaster irresponsibility." A. 471, n. 35. Certainly then, the promulgation of the Fairness Doctrine cannot be said to exhaust the Commission's responsibilities under § 315. The fact that a public issue, or a range of public issues, has been "covered" may justify the determination that other matters should be allowed to come to the fore in order to promote variegated broadcast programming. It provides no justification, however, for allowing licensees to subordinate the rights of editorial advertisrs to those of commercial advertisers. For their decision to do so serves no free speech interest. Instead it makes a "desert" out of a potential public interest message "oasis." Cf. A. 465.

It is equally plain that § 153(h) of the Act, providing that "a person engaged in radio broadcasting shall not . . . be deemed a common carrier," does not, as the Government and broadcasters claim, cut against the decision below. As the Government itself recognizes, this provision was added on the ground that common carrier status would require licensees, who initiated "discussion of [a] question affecting the public" to "give *all* their time to that kind of discussion or no public question could be discussed" (Gov. Br. p. 41, quoting 61 Cong. Rec. 12502, 12504). Thus Congress's concern was that a requirement to accommodate all

who wished to speak would so strip broadcasters of their right to make editorial judgments that the interest in diversified programming would suffer. But under the decision below "broadcasters would retain wide ranging control" (A. 483); they would not be required to accept all public interest messages that are submitted, or any particular message (A. 482). Indeed, the instant cases do not deal with program time at all. They deal with advertising time, and nothing in the lower court's decision requires broadcasters to expand advertising time to the detriment of programming. Moreover, in light of this Court's decision in *Red Lion*, it is plainly extravagant to argue, as the Government does, that any rule, no matter how limited and justified, which "enjoin[s] . . . the licensee . . . from exercising journalistic judgment" is contrary to § 153(h). Gov. Br. p. 43. For *Red Lion*, 395 U.S. at 390-395, validated the Commission's "personal attack" and "editorialization" rules, not simply the Fairness Doctrine. And those rules cut more deeply into the journalistic judgments of broadcasters than the limited regulation of advertising time suggested by the court below.

In *Red Lion*, as here, the broadcasters argued that a ruling which effectuated the free speech rights of non-licensees created prohibitive administrative problems. This Court, rejecting that contention, replied that this "possibility is at best speculative," that "in the past" the doctrine in question "has had no such overall effect," and that "if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications"

(395 U.S. at 393). The "spectres of chaos, grossly imbalanced programming and financial disaster" (A. 486) advanced in the instant cases are no more credible than those found insufficient in *Red Lion*.

The court below charged the Commission with the task of "develop[ing] 'reasonable regulations' . . . requiring that some . . . editorial . . . advertising . . . be accepted" (A. 484). That responsibility is plainly no more onerous than the comparable task—to develop the rules governing expressive activity on the streets and other public places—which this Court has assigned to far less expert agencies in its decisions in *Cox* v. *New Hampshire*, 312 U.S. 569, and its progeny. Indeed, it may well be more manageable since the factors to be evaluated in the broadcasting context are more nearly comparable. Certainly it is less taxing than the highly sensitive regulatory burden the Commission has assumed for itself in developing and explicating the controls on licensee programming decisions in the Fairness Doctrine. And, looking to the past as a guide, the court below noted: "Although many broadcasters already do allow editorial advertisements on the air, we have not been shown one reason, drawn from their experience, to suggest that chaos has resulted." A. 484. Moreover, the rule laid down by the lower court closely parallels the principles stated by the Commission in *United Broadcasting Co.*, 10 F.C.C. at 417-518. Obviously the Commission believed itself competent to deal with the problem then. There is no reason to believe it is less competent now. For its retreat from *United Broadcasting* in the instant cases is supported by technical arguments of law, and not by concrete examples of practical difficulties experienced under that precedent.

The situation here is thoroughly comparable to that presented in *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177. There the NLRB challenged a court of appeals decision on the ground that to "apply the abstractly just doctrine" decreed "would put on the Board details too burdensome for effective administration" (313 U.S. at 198). Justice Frankfurter replied:

> "Simplicity of administration is thus the justification for [the NLRB's position] . . . But the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment. The Board, we believe, overestimates administrative difficulties and underestimates its administrative resourcefulness." *Ibid.*

The contentions that the decision below will lead to "grossly imbalanced programming and financial disaster" (A. 486) rest on an even less substantial foundation. To be sure, since the subject here is paid broadcast time the rule contended for requires that those who wish to initiate the dialogue on matters of public importance during advertising time must be able to pay their way. But the fact that there are some who may not be able to afford to take advantage of this opportunity does not justify the present improper and unconstitutional discrimination against those who can. The argument to the contrary is no better than the proposition that *New York Times*, 376 U.S. 254, should have been decided in favor of Mr. Sullivan because it expanded the rights of those who were able to afford newspaper advertisements but not those who could not. The critical point is that the decision below, like the decision in *New York Times*, vastly increases the opportu-

nity for "uninhibited, robust and wide open . . . debate" (376 U.S. at 270). Moreover, since it is a debate on public issues that the First Amendment seeks to encourage, there is ample room for the Commission to set limits on the amount of time "one group or the representatives of one particular narrow viewpoint" (A. 485) may buy, either in total, or in any given hour or day. The principles of debate also require that both sides be heard. Thus, we believe that it is implicit in the entire scheme of broadcast regulation enunciated by this Court in *Red Lion*, 395 U.S. at 389-392, "that if editorial advertisements are accepted on one side of an issue, then broadcasters must also accept at least some advertisements on the other side of the issue, free of charge if necessary. *See Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963)." A. 486. This obligation, of course, blunts the cutting edge of the argument that the decision below unfairly favors the well-to-do.

This does not mean that a rule requiring licensees to accept some editorial advertisement should cost broadcasters a single dollar of lost revenue. The argument here is that broadcaster discrimination against public interest massages in the sale of advertising time should be prohibited; and not that licensees should be required to subsidize this method of speech. Thus, if experience demonstrates that carrying editorial advertisements entails significantly higher costs, because of the *Cullman* doctrine, or for other reasons, and thus generate a lower return, broadcasters should be allowed to reflect this fact in their rate structure. Obviously, neither this suggestion, nor those advanced by the court below (A. 483-488), are the final answer. The ultimate determinations are for the Commission. But one point is

plain. The alternatives which have been offered demonstrate that there is nothing to the view that this problem is beyond rational solution once the Commission sets its best efforts to solving it.

4. The Commission on the one hand, and the broadcasters on the other, advance mutually inconsistent arguments, whose common object is to sweep all the chessmen from the board.

The Commission objects: "The decision of the court of appeals in this case substantially encroaches upon [the Commission's] responsibility. In effect it transfers the making of basic policy judgments from the Commission to the courts." Gov. Br. 26. To begin with, this argument grossly exaggerates the scope of the decision below. Here, as below, the Commission "apparently misunderst[ands] the narrowness of the issue" and the "modest" nature of the "reform" decreed. A. 482. The lower court was scrupulous to respect the right of the Commission to choose as long as it demained within the "range of choices" (Gov. Br. p. 36) open to it under the Act and the Constitution. "[W]e leave the Commission and licensees broad latitude to develop 'reasonable regulations' which will avoid any possibility of chaos and confusion." A. 484. The lower court's decision was no judicial usurpation, but the exercise of the responsibility imposed on the courts by the judicial review provision of the Communications Act, which the DNC and the BEM invoked after the Commission denied them relief. It should go without saying that that responsibility did not abate, nor the lower court's jurisdiction lapse, because the Commission, after deciding these cases on the merits and without any suggestion that complex

practical, rather than purely legal, issues were involved, belatedly instituted a rule making proceeding while they were *sub judici*. See Gov. Br. pp. 5-20. Indeed, the prospect that the Commission may ultimately issue a rule accentuates the need for an authoritative exposition of the governing statutory and constitutional principles. As the Government concedes, "when the Commission formulates regulations for encouraging free discussion over the airwaves, it must act consistently with the First Amendment and . . . whether it has done so depends not only on the objective but also on the means adopted to achieve it." Gov. Br. p. 35. For "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences, which is crucial here . . . may not constitutionally be abridged either by Congress or *by the FCC.*" *Red Lion*, 395 U.S. at 390 (emphasis supplied). The court below did no more, and no less, than to exercise the high judicial function of confining the Commission's discretion within Constitutional bounds.

In light of the Commission's assertion of power to regulate the subject to this lawsuit to the exclusion of the courts, it is rather startling to find the broadcasters arguing that their choices as to who shall speak are beyond all regulation.

This argument is foreclosed by this Court's response to the broadcasters' insistence that the Fairness Doctrine they now embrace, was unconstitutional. For in *Red Lion*, 395 U.S. at 389-392, the Court held that the First Amendment required, and not simply permitted, governmental regulation of programming decisions by licensees. The broadcasters were subject to the First Amendment with respect to programming not simply because they received some benefit

from the Government (cf. *Moose Lodge* v. *Irvis*, ... U.S. ....., 40 L.W. 5127) but because the Government was involved with the very activity alleged to be unconstitutional (cf. *Powe* v. *Miles*, 407 F.2d 73, 81 (C.A. 2, Friendly, J.). That activity, there as here, was the exclusion, by the force of criminal sanctions (§ 301 of the Act), of all persons who do not have broadcast licenses, or who are not permitted to speak by a licensee. This is the source of the licensees' "monopoly of a scarce resource which the Government has denied others the right to use." *Red Lion*, 395 U.S. at 391. The same sanctions which prevented Mr. Cook from replying to the personal attack on him which generated the *Red Lion* litigation (see 395 U.S. at 371-372), foreclose the DNC and the BEM from broadcasting their message of public importance without the consent, voluntary or involuntary, of a licensee. Whatever there may be in this case which is left open after *Red Lion*—and we do not believe it is anything of principle—it is certainly no longer open to the broadcasters to argue that their decisions as to who shall speak in advertising time are outside the First Amendment.

CONCLUSION

For the foregoing reason, the decision of the court below should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-863

COLUMBIA BROADCASTING SYSTEM, INC.,
Petitioner,
v.
DEMOCRATIC NATIONAL COMMITTEE, *et al.*,
Respondents.

No. 71-864

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,
v.
BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, *et al.*,
Respondents.

No. 71-865

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.
Petitioner,
v.
BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, *et al.*,
Respondents.

No. 71-866

AMERICAN BROADCASTING COMPANIES, INC.,
Petitioner,
v.
DEMOCRATIC NATIONAL COMMITTEE, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER COLUMBIA BROADCASTING SYSTEM, INC.

INTRODUCTION

In their briefs to this Court, respondents Democratic National Committee ("DNC") and Business Executives' Move for Vietnam Peace ("BEM") both support the court of appeals' constitutional holding, but DNC—perhaps recognizing the weakness of the constitutional claim—places primary reliance on its argument that the Communications Act creates a requirement of paid access.

Respondents' constitutional claim must be judged in the context of the heavy burden they bear. The question in this case is not whether Congress and the Commission could, if they chose, adopt a regulatory scheme requiring the sale of advertising time for partisan announcements, or whether that scheme would be desirable, workable, or in the public interest. Rather, the issue is whether the Constitution compels Congress and the Commission to impose a system which both have rejected. What the court of appeals did, and what respondents are asking this Court to do, is to place Congress and the Commission in a constitutional straitjacket, obligated for all time to include a requirement of paid access as part of the regulatory scheme.

DNC and BEM have not met their burden. They have not demonstrated that action by a broadcaster is the equivalent of action by the state. They have not demonstrated that the regulatory system devised by Congress and the Commission results in an unconstitutional discrimination against speech on public issues or the exclusion of partisan speech. Far from discriminating against views on public issues, the present regulatory system accords such views a preferred position and provides extensive opportunities for direct expression of views by partisans.

Nor has DNC succeeded in its resurrection of the argument—which the court below specifically declined to adopt

and which BEM has abandoned in this Court—that the Communications Act requires the result it seeks. DNC's statutory claim cannot be reconciled with the language of the statute, its legislative history, or the administrative and judicial decisions interpreting it.

I. RESPONDENTS HAVE NOT SHOWN THAT THE FIRST AMENDMENT COMPELS THE RESULT THEY SEEK.

A. Respondents Have Failed To Establish the "State Action" Necessary To Invoke Application of the First Amendment.

The opinion of the court below rested squarely on a holding that the action of broadcasters in declining to sell time for partisan announcements constituted "state action" directly subject to constitutional restraints.[1] Respondents in this Court necessarily make a similar argument. For the reasons stated in our opening brief,[2] the court of appeals' holding on the state action issue cannot be sustained. Two recent decisions of this Court substantially reinforce this conclusion.

Moose Lodge No. 107 v. *Irvis*, 407 U.S. 163 (1972), involved the question of whether the Fourteenth Amendment applied to the action of a state liquor licensee—the Moose Lodge—in refusing service to a black guest of a member of the Lodge. The Lodge could not serve liquor without its state license; and the statutory scheme regulating the issuance of such licenses was a comprehensive one embodying state supervision of virtually all aspects of the licensee's business.[3]

The Court held that this extensive regulatory scheme was insufficient to invest the licensee's discriminatory action with a governmental character. "Our holdings indicate," the Court stated, "that where the impetus for

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[1] App. 455-64.

[2] CBS Br. 47-55.

[3] A detailed description of the Pennsylvania regulatory scheme is set forth in the decision of the three judge district court in the case. *Irvis* v. *Scott*, 318 F. Supp. 1246, 1248-50 (M.D. Pa. 1970).

the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' . . . in order for the discriminatory action to fall within the ambit of the constitutional prohibition." [4]

In announcing this test, the Court carefully distinguished two cases relied on by respondents and the court below in this case—*Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), and *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451 (1952). *Burton*, the Court stated, turned on the fact that the government had become involved in a "symbiotic relationship" with the private lessee in the state-owned building and thus became a joint participant in its discriminatory action. 407 U.S. at 172-73, 175. By contrast, in *Moose Lodge*, the Court found that the state licensing scheme, though detailed, did not make the state a joint participant in the club's discriminatory action. 407 U.S. at 175. So, too, the Court found that the *Pollak* case requires a finding of state action only where the government has "affirmatively approved the practice of the regulated entity after full investigation." 407 U.S. at 175-76 n.3. No such approval or endorsement was found in *Moose Lodge*. *Id.*

Moose Lodge clearly governs this case. Here, as in *Moose Lodge*, there is a detailed licensing scheme, but not the "joint participation" and "symbiotic relationship" critical to the result in *Burton*.[5] Here, as in *Moose Lodge*, the regulatory agency has tolerated, not affirmatively approved, the licensee's action. There has been no affirmative finding by the Commission that a licensee policy of refusing to sell advertising time for partisan announcements serves the public interest. Rather, the Commission has merely declined to require licensees generally to sell ad-

[4] 407 U.S. at 173.

[5] In the programming area, the separation between the Commission and the licensee is particularly clear. The Communications Act is founded on the premise that the broadcaster, not the government, selects program material. See CBS Br. 47-48, 52.

vertising time for partisan announcements, while making clear that licensees are free to make such sales if they choose.[6] Thus here, as in *Moose Lodge*, state action is lacking.

DNC suggests, however, that whatever the impact of this Court's decision in *Moose Lodge*, DNC's position on state action is supported by another recent decision of the Court: *Lloyd Corp.* v. *Tanner*, —— U.S. ——, 92 S. Ct. 2219 (1972).[7] There the Court held that, absent special circumstances, a privately owned shopping center need not permit access to its premises for political handbilling. DNC's efforts to find comfort in the *Lloyd* decision are difficult to fathom. In fact *Lloyd* further undermines the state action holding of the court below, by limiting two cases on which that court relied—*Marsh* v. *Alabama*, 326 U.S. 501 (1946), and *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).[8]

Lloyd makes clear that those cases announced no general principle that because a forum is appropriate for communication or is open to persons desiring to transact commercial business, it is therefore subject to the constitutional limitations applicable to the government.[9] To

[6] App. 265. In its decision in the *DNC* case, the Commission took note of the fact that ABC and NBC were willing to sell time to DNC under certain circumstances App. 248, 251, 255. The multitude of broadcast stations and the diversity of their policies on the sale of time is in sharp contrast to the situation in *Pollak*, where the utility commission's approval of the bus company's policy meant that all bus riders in the city would be subject to that policy.

[7] DNC Br. 72.

[8] Judge Wright also relied on the district court's decision in the *Lloyd* case (308 F. Supp. 128 (D. Ore. 1970)), a decision that has now been reversed by this Court.

[9] Respondents apparently believe that the *Lloyd* case denied a right of access to shopping centers on the ground that they were not appropriate places for the communication of ideas. By contrast, respondents suggest, the broadcast medium is peculiarly appropriate

the contrary, *Lloyd* held that a shopping center does not "lose its private character merely because the public is generally invited to use it for designated purposes." [10] So here the broadcaster has not lost his private and nongovernmental character simply because commercial advertisers are allowed to present product advertisements or because discussion of controversial issues is presented in news and public affairs broadcasts.[11]

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for the communication of ideas. DNC Br. 50-51, 72; BEM Br. 78. *Lloyd* rested on no such finding. The shopping center was by its very nature clearly a forum suitable for communication, and the record showed that the shopping center had been used for parades, patriotic addresses, and speeches by presidential candidates on public issues. 92 S. Ct. at 2222, 2233-34. Nor does the fact that alternative areas for communication were available in *Lloyd* distinguish that case from this one. Respondents in this case have failed to show that other means of communication are not available to them; they also have failed to show that their views are not being presented in the broadcast medium. See CBS Br. 36-38 and pp. 9-11, *infra*.

[10] 92 S. Ct. at 2229.

[11] DNC attempts to undermine the private character of broadcast licensees by emphasizing their use and dominion over a "public" resource—the airwaves. DNC Br. 71-72. The concept of the airwaves as a publicly-owned resource is a rather metaphysical one that has been of little relevance in resolving specific legal questions. See, *e.g.*, Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 783 (1972); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 153 (1967). To concede broad federal regulatory authority over radio as an instrumentality of commerce does not imply the existence of property rights in the United States or in the public at large. The Communications Act nowhere states that such property rights exist, but merely requires licensees to waive claims to the use of the ether "as against the regulatory power of the United States." 47 U.S.C. § 304. The quoted phrase was deliberately inserted in the 1927 Radio Act to make it clear that there was no assertion of government or public ownership of the airwaves. See 68 CONG. REC. 2869-70 (1927) (remarks of Sen. Dill); *id.* at 2872 (remarks of Sen. Watson).

In any event, whatever the legal character of the airwaves, the essential point is that Congress chose to exercise its powers over this resource, not by creating a governmentally owned or financed

Thus, the *Moose Lodge* and *Lloyd* decisions reinforce the showing in our opening brief that the entire foundation of respondents' constitutional argument—state action—is built on quicksand.[12]

B. Respondents Have Failed To Establish the Existence of or Need for a First Amendment Right To Purchase Advertising Time for Partisan Announcements.

We have shown in our opening brief how the existing scheme of broadcast regulation, centering around the fairness doctrine, promotes the paramount First Amendment interest of the public in being informed on public issues, and fosters robust and vigorous debate.[13] Respondents, however, contend that this system is constitutionally insufficient, and argue that there is an independent First Amendment interest in self-expression that is not now being served.[14]

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system of broadcasting, but by permitting the growth, on a licensed basis, of a system of privately owned stations with programming decisions made by licensees, not the government. Compare *Moose Lodge, supra.*

[12] A recent decision by the United States District Court for the Central District of California is directly on point on the state action issue. In *Smothers* v. *CBS*, C.D. Cal. No. 69-1898-AAH, decided Sept. 18, 1972, the court dismissed a complaint charging CBS with violating the plaintiffs' asserted First Amendment rights by engaging in "censorship" of programs prepared for broadcast. The court concluded that "despite the fact that CBS is regulated by the Commission . . ., CBS is not a branch of any government and its activities are not governmental in character."

[13] CBS Br. 35-38. As we noted, the Commission is currently in the process of completing a comprehensive inquiry designed to ensure that the fairness doctrine is achieving these goals. See *Notice of Inquiry*, Docket No. 19260, 30 F.C.C.2d 26 (1971).

[14] DNC Br. 35-46; BEM Br. 24-40. DNC also makes the presumptuous argument that as a major political party it has special rights under the First Amendment to buy broadcast time. DNC Br. 59-62. This argument is utterly without foundation. No one disputes the important role of political parties in the United States—a role that

In so arguing, respondents ignore the essential teachings of this Court's landmark decisions in the broadcast field: that the unique characteristics of broadcasting—the inherent scarcity of frequencies and the inherent limitations of time in the broadcast day—require the subordination of individual interests in self-expression to the central interest of the public in being informed on public issues, and thus preclude the creation of a constitutional right of individual access. In broadcasting, "freedom of utterance is abridged to many who wish to use the limited facilities of radio" (*National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226 (1943)), and "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 388 (1969).

Moreover, respondents have not shown that the existing system fails to afford opportunities for self-expression at the same time that it serves the paramount interest of the viewing and listening public in access to information.

True, licensees such as CBS believe that the public can most effectively be informed through the application of journalistic judgments to determine what issues, views

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may have a variety of implications for public policy. This is reflected in Section 315 of the Communications Act and the policies of licensees like CBS, who regularly sell large amounts of time to candidates and political parties. But we are aware of no decision of this Court holding that the First Amendment requires that political parties be favored over other groups or persons, and DNC cites none. As the Court of Appeals for the District of Columbia Circuit recently stated in rejecting a claim by DNC of a First Amendment right for it to respond to Presidential broadcasts:

> "DNC feels it is obligated to inform the nation of the viable options open to it. Should this be DNC's manifest destiny we can find no reason to compel the networks to assist it. Can it be said that others are not equally capable of the task?" *Democratic National Committee* v. *FCC*, —— U.S. App. D.C. ——. 460 F.2d 891, 910 (1972), *petition for cert. pending* (Oct. Term 1972, No. 71-1405).

and spokesmen should be presented. This is the essence of the function of the press in both print and broadcast media. As Judge Learned Hand once put it:

> "News is history; recent history, it is true, but veritable history, nevertheless, and history is not total recall, but a deliberate pruning of, and calling from, the flux of events. . . . In the production of news every step involves the intervention of some news gatherer, and two accounts of the same event will never be the same. . . . A personal impress is inevitable at every stage; it gives its value to the dispatch, which without it would be unreadable." [15]

But this does not mean—as respondents would have it [16]—that CBS and other licensees are presumptuous "paternalists" who invariably seek to filter all views through themselves.[17] In making these allegations, respondents ignore the fact that the Commission's fairness doctrine requires licensees to cover issues in a robust and vigorous way and to present directly the views of partisans. As the Commission emphasized in its opinion in the *DNC* case, licensees may not eschew controversy, but must cover all significant public issues; they may not exclude particular views because they disagree with them; they must present "representative community views and voices" and "some of the voices must be partisan. A licensee policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner would run counter to the 'profound national commit-

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[15] *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S.D. N.Y. 1943), *aff'd*, 326 U.S. 1 (1944).

[16] DNC Br. 37, 41-42; BEM Br. 34.

[17] Contrary to respondents' suggestion, CBS has never claimed journalistic infallibity. For example, in the case of the "Selling of the Pentagon" broadcast dwelt on by DNC at length (DNC Br. 42-44), CBS presented extensively and directly the views of critics of that broadcast. See *Letter to Hon. Harley O. Staggers*, FCC 71-643, June 21, 1971.

ment' that debate on public issues should be uninhibited, robust, and wide-open." [18]

There is no basis in this record for concluding that the existing system of broadcast regulation fails to ensure adequate opportunities for self-expression and robust debate. Neither DNC nor BEM has at any time in these proceedings shown that licensees are in fact eschewing controversy or failing to present partisan voices on public issues. To the contrary, as we discussed in our opening brief, the record shows, for example, that CBS devotes substantial time to presenting directly the views of Democratic spokesmen, anti-war spokesmen, and other partisans.[19] In sum, to the extent that the record speaks to this question, it fully supports the Commission's conclusion that the present system is one which ensures vigorous debate and the presentation of partisan views.

Instead of relevant facts, respondents rely upon criticism of the broadcast medium unrelated to the issues in this case.[20] DNC's efforts in this regard are particularly misplaced. It appears to rely primarily on charges that licensees in general, and CBS in particular, have engaged in inaccurate or misleading journalistic prac-

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[18] App. 259, citing *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

[19] CBS Br. 36-38. This conclusion is highlighted by the extensive coverage of the national conventions of the Democratic and Republican Parties provided by CBS and the other networks. The amount of "direct access" afforded party spokesmen through broadcast of convention proceedings was enormous. In its four days of coverage of the Democratic National Convention, the CBS Television Network provided 36 hours and 42 minutes of coverage, a substantial portion of which consisted of direct presentation of convention proceedings. Taking into account coverage of directly related events such as the hearings of the Democratic platform committee, Senator McGovern's speech on his new Vice Presidential choice, and the "mini-convention" held by DNC to select a new candidate for Vice President, the total coverage came to 43 hours and 23 minutes.

[20] DNC Br. 40-44; BEM Br. 34-35.

tices.[21] Apparently DNC is dissatisfied with broadcast coverage of news and public affairs and believes the public would be better served by paid presentations prepared by it and other partisans. The distrust and suspicion of journalism expressed by DNC is, of course, nothing new in American history.[22] It merely points up, we submit, the vital historic role of the press as critic of political institutions and the importance of keeping the press free from governmental restraint and interference. It is ironic that DNC, in invoking the First Amendment to impose new governmental restrictions on broadcasters, actually relies on the fact that the free broadcast press has been sufficiently robust to draw criticism. DNC's argument serves only to emphasize the inherent threat to freedom of the press presented by the decision below.

C. The Refusal of Broadcast Licensees To Sell Advertising Time for Partisan Announcements Does Not Constitute an Unconstitutional Discrimination Against Speech on Public Issues.

Both DNC and BEM argue that a right of paid access for partisan announcements should be recognized in order to eliminate an alleged unconstitutional discrimination

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[21] DNC Br. 41-44.

[22] Throughout history, Presidents, public officials and party leaders have expressed varying degrees of hostility toward the press. See generally W. SMALL, POLITICAL POWER AND THE PRESS 43-63 (1972). "Jefferson was so vilified by the opposition press that he once suggested that editors categorize the contents of their papers under four chapters: Truths ('The first chapter would be very short'), Probabilities, Possibilities, and Lies." W. RIVERS, THE OPINION MAKERS 5 (1965). Franklin Roosevelt once rejected a proposal to make it a felony for a newspaper knowingly to publish a falsehood by remarking: "I'm trying to spare expenses and I don't want any more prisons!" J. BURNS, THE LION AND THE FOX 346 (1956). More recently, President Kennedy's cancellation of the White House subscription to the New York Herald Tribune and the incumbent Vice President's vigorous criticism of the broadcast and printed press have received wide attention. See T. SORENSEN, KENNEDY 317 (1965); R. EVANS & R. NOVAK, NIXON IN THE WHITE HOUSE 315-17 (1972); W. SMALL, *supra*, at 127-42.

against speech on public issues.[23] They argue that once broadcast licensees "open up" time by selling it to commercial advertisers, their refusal to sell time to partisans on public issues represents unlawful discrimination.[24]

The short answer to this argument is that, even if broadcast licensees were treated as government agencies subject to constitutional restrictions on discrimination,[25] there is no invidious discrimination involved here. In the cases relied upon by Judge Wright and respondents,[26] the transit companies and school newspapers that refused to sell advertising space for partisan messages were under no statutory duty to provide their riders and readers with full and fair coverage of public issues; they had no independent legal responsibility that ensured access to their forum for representative views on such issues.[27] Here, by contrast, broadcast licensees have a special statutory obligation—as well as a responsibility as journalists —to present contrasting views on public issues. Failure to meet this obligation can result in loss of license.[28] The existence and performance of this obligation—which ac-

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[23] DNC Br. 55-57; BEM Br. 14-24.

[24] DNC Br. 55; BEM Br. 18-19.

[25] All the cases relied upon by respondents and the court below in this regard are distinguishable on the ground that they involved government bodies or government-owned entities subject to constitutional limitations. See pp. 4-8, *supra*.

[26] See CBS Br. 21 n.50; App. 475.

[27] Indeed, in the transit cases, the refusal to sell advertising space for discussion of controversial issues resulted in a total exclusion of such speech from the forum.

[28] See *Brandywine-Main Line Radio, Inc.* v. *FCC*, —— U.S. App. D.C. ——, —— F.2d —— (No. 71-1181, decided Sept. 25, 1972). See also *Committee for the Fair Broadcasting of Controversial Issues*, 25 F.C.C.2d 283, 298 n.24 (1970) (holding that there is no obligation to sell time to spokesmen for views opposed to the Administration's Vietnam War policy but requiring the networks to provide additional time free of charge under the fairness doctrine for expression of such views).

tually places controversial speech in a preferred position—ensures that a broadcaster who declines to sell time for partisan announcements will in no way be discriminating against speech on public issues. His differing treatment of commercial advertisements and discussion of controversial issues is clearly reasonable in light of the distinction between the two under the First Amendment[29] and the regulatory scheme.[30]

Thus, there is no substance to DNC's charge that the refusal of broadcasters to sell time for partisan announcements constitutes a "total ban" on the use of the medium for communication of ideas.[31] So, too, the broadcaster's door is not, in BEM's misleading metaphor, "open" to speech on mouthwash and beer but "slammed shut" against speech about "hunger, consumer exploitation or war."[32] To the contrary, the broadcaster is under no legal obligation to carry any advertisement for mouthwash or beer.

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[29] See *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942).

[30] In support of their "discrimination" argument respondents also rely on two recent decisions of this Court striking down municipal ordinances which permitted labor picketing of schools, but forbade all other forms of peaceful picketing. *Police Department* v. *Mosley*, —— U.S. ——, 92 S. Ct. 2286 (1972); *Grayned* v. *City of Rockford*, —— U.S. ——, 92 S. Ct. 2294 (1972). These cases simply are not in point. They involved discriminatory exclusions of one form of protected speech. A picket sign which contained a message relating to a labor dispute was permissible, but one containing a message relating to some other issue was not permitted.

As discussed in the text, the broadcast system sanctions no such discrimination. The rationale of the *Mosley* and *Grayned* decisions might conceivably apply (assuming state action) to a licensee who, while presenting spokesmen on the Indochina War over his facility, refused to present any spokesmen on other significant public issues. That licensee, of course, would also be in violation of the Commission's fairness doctrine, and perhaps even be in danger of losing his license. Cf. *Brandywine-Main Line Radio, Inc.* v. *FCC*, *supra* note 28.

[31] DNC Br. 48, 51.

[32] BEM Br. 16.

But he is obligated, under the fairness doctrine, to present contrasting views on significant public issues like hunger, consumer exploitation and the war.

D. Respondents Have Not Rebutted the Showing by Petitioners that a Right of Paid Access Would Interfere with the Public's Interest in Being Informed, Favor the Affluent, and Lead to a Major Increase in Government Regulation of Speech and the Press.

Respondents have failed to come to grips with the fundamental difficulties and dangers inherent in a regulatory scheme requiring a right of paid partisan access.

Respondents belittle the claim that the court of appeals' decision would lead to significant distortions in the presentation of public issues, suggesting that licensees will retain adequate discretion to ensure that this will not occur.[33] This suggestion is patently inconsistent with respondents' argument that the existing system is constitutionally deficient because it affords such discretion to licensees in the coverage of public issues. The suggestion also flies in the face of the court of appeals' decision, which rejects licensee discretion in this critical area. Judge Wright made clear that licensees cannot refuse to sell advertising time on the ground that the issue to be discussed is trivial; that there are significant issues more deserving of coverage; that similar or identical viewpoints have already been presented without charge; or that the issue has already been fully and fairly treated.[34] In the absence of such discretion, a system of paid access can only produce haphazard results and frustrate the licensee's efforts to achieve overall fairness.

Moreover, respondents fail to answer petitioners' argument that a system of paid partisan access will favor

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[33] BEM Br. 53-55; DNC Br. 65.

[34] App. 469, 471-73, 477, 485.

the affluent.[35] This is not a problem that can be solved by application of the fairness doctrine to require that replies be presented whether or not persons seeking to reply are able to pay.[36] The point here is that the new constitutional right established by the court below is one that can be exercised only by those with the wherewithal to purchase time; and even if the fairness doctrine continues to apply, it is those who purchase time who will, as the Commission aptly put it, set the agenda for discussion. Such governmentally compelled discrimination in favor of the affluent can hardly be squared with the policies of the Constitution.[37]

In this connection, it is important to bear in mind that commercial advertisers would be major beneficiaries of a paid access system. CBS and many other licensees now follow a policy designed to exclude from commercial advertising the presentation of views on public issues.[38] Under the court of appeals' holding—that those who wish to present paid partisan announcements must be given access on the same footing as commercial advertisers—it is difficult to see how such a policy could be maintained. The result could well be a veritable flooding of the airwaves with the presentation of the editorial views of commercial advertisers—who can afford to purchase substantial numbers of advertising spots—on a variety of controversial issues of special concern to them. The resultant distortion of the agenda for discussion of controversial issues would be enormous.

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[35] App. 263. BEM ultimately concedes that the result it seeks "might result in some advantages to the affluent." BEM Br. 50.

[36] Indeed, both respondents appear to concede that if broadcasters are to be compelled to sell advertising time for partisan announcements, it might well be inappropriate and unreasonable to require that opposing views be presented without charge. DNC Br. 65; BEM Br. 58-59. This is only realistic. See CBS Br. 43 n.96.

[37] See CBS Br. 44.

[38] CBS Br. 41.

Finally, under the court of appeals' decision, government intervention—through Commission and court decisions—in the process of determining who should be heard, how often, and on what issues would be more frequent and more pervasive. After all, even where a First Amendment right is "abridgeable," someone must decide whose right will be abridged and whose will not, and the extent and nature of the abridgement constitutionally permissible in a given case.

Respondents do not seriously dispute that the decision below would lead to more government intervention. Indeed, BEM asserts that this "is a development . . . to be anticipated and welcomed." [39] Their response to this point, basically, is that it need not be a matter of concern since the Commission and the courts are already supervising licensee decisions under the fairness doctrine.[40] On this theory, of course, any new governmental intervention in the process of broadcast news coverage could be sustained on the ground that it involved only an increase in the total amount of intrusion already permitted.

In any event, the role of the Commission and the courts in supervising licensee decision-making under the fairness doctrine provides no precedent for what respondents seek here.[41] The justification for governmental in-

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[39] BEM Br. 60.

[40] DNC Br. 66-67; BEM Br. 59-61.

[41] Contrary to DNC's suggestion (DNC Br. 45, 66), CBS did not argue in *Red Lion* that the fairness doctrine was either unworkable or unconstitutional. The quotation from CBS' brief cited at page 66 of DNC's brief referred to the personal attack rules, *not* the fairness doctrine. As CBS emphasized at the outset of its brief in *Red Lion*, one of its major purposes was "to show that this case [*Red Lion*] does not involve the constitutionality of the Commission's general fairness doctrine, and that the issues raised by the general fairness doctrine differ distinctively from those presented by the personal attack rules." Brief for Respondent Columbia

tervention that exists in the case of the fairness doctrine —the need to ensure that the public interest in being fully and fairly informed is vindicated—is not present. Moreover, under the fairness doctrine governmental intervention is materially less pervasive.[42] The licensee is judged on his overall performance and is allowed latitude to make reasonable judgments as to who shall be heard and on what issues. With the narrow exception of the personal attack and political editorializing rules, there is no requirement that any particular spokesman be presented. Under the court of appeals' decision in this case, by contrast, every person, organization or corporation whose request to purchase time was rejected by a licensee would have a claim that his or its constitutional rights had been violated.

E. There Is No Basis for DNC's Attempt To Extend the Court of Appeals' Holding to Program Time.

DNC's attempt to suggest that the opinion of the court below requires the sale of time for program-length presentations by partisans as well as the sale of advertising time for partisan announcements[43] is baseless. It is noteworthy that none of the other parties in this case, including respondent BEM, suggests that the decision below applies to program time. Indeed, DNC itself, in urging this Court to deny certiorari in this case, construed the opinion as limited to advertising time.[44] And the Commission,

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Broadcasting System, Inc., No. 717, Oct. Term 1968, p. 2. See also *id.* at 54-62, showing how the fairness doctrine, because of the discretion it affords licensees, represents a form of regulation which does not unduly intrude the government into journalistic judgments on a day-to-day basis.

[42] See generally *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1247 (1949); *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598, 599 (1964).

[43] DNC Br. 8 n.6.

[44] Brief for Respondent Democratic National Committee in Opposition, Nos. 71-863, 71-864 and 71-866, pp. 6, 10, 15.

in a subsequent decision,[45] so read the court of appeals' decision.

The central rationale of the court of appeals' opinion was based on the alleged discrimination created by the sale of spot announcement time to commercial advertisers. That rationale—even if it were valid—would have no application to program time, since broadcast licensees are forbidden by Commission policy to sell "program-length commercials." [46] Moreover, the court of appeals recognized that requiring the sale of program time would intrude substantially and directly on the journalistic prerogatives of broadcasters, and accordingly was careful to note that its opinion had no application to program time. This is reflected throughout the opinion, and at one point was stressed in the following terms:

> "It is particularly important that these cases deal only with the public's First Amendment interests in broadcasters' allocation of advertising time. They deal only with time relinquished by broadcasters to others; petitioners argue only that, in relinquishing that time, broadcasters must not discriminate against protected expression. *In normal programming time, closely controlled and edited by broadcasters, the constellation of constitutional interests would be substantially different.* In news and documentary presentations, for example, the broadcasters' own interests in free speech are very, very strong. The Commission's fairness doctrine properly leaves licensees broad leeway for professional judgment in that area. But in the allocation of advertising time, the broadcasters have no such strong First Amendment interests." (Emphasis added.)[47]

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[45] *Committee of One Million Against Admission of Communist China to the United Nations*, 33 F.C.C.2d 545 (1971).

[46] *E.g., Columbus Broadcasting Co.*, 18 Pike & Fischer R.R.2d 684 (1970); *Multimedia, Inc.*, 18 Pike & Fischer R.R.2d 687 (1970).

[47] App. 464-65. See also App. 468 n.32, 468-69, 472, 482-83 ("Broadcasters would retain full latitude to control the content of their pro-

Any holding that there is a First Amendment right to purchase program time for partisan presentations would magnify immensely all the problems already inherent in the court of appeals' holding. In a limited-time medium, it would become impossible to maintain journalistic standards of newsworthiness and fairness or to assure the public access to discussion of the *significant* issues of the day. As Judge Wright apparently recognized, such a holding would represent a direct assault on the central journalistic function of the broadcast medium.

We submit that DNC's attempt to stretch the court of appeals' opinion to cover program time as well as advertising time serves merely to point up the inherent problems in holding that there is any individual First Amendment right of paid access to the broadcast medium. It is easier to create a new constitutional right than to contain it once created. If the broadcast licensee is stripped of his trustee responsibility as to advertising time, it is tempting to seek the same result—as DNC now does—as to program time. "Rights" today reassuringly labeled limited and "abridgeable" can tomorrow easily be extended until the licensee is left with none of the responsibilities and functions he now has under the Communications Act and this Court's decision in *Red Lion*.

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gramming. Their editorial control over nonadvertising time would not be disturbed whatever. All that would be affected is their allocation of advertising time. . . .")

II. CONTRARY TO DNC'S CONTENTION, THE COMMUNICATIONS ACT DOES NOT REQUIRE BROADCASTERS TO SELL TIME FOR DISCUSSION OF CONTROVERSIAL PUBLIC ISSUES.

DNC argues that this Court can avoid the difficult constitutional issue by holding that the Communications Act requires broadcasters to sell time for discussion of controversial public issues.[48] Notably, BEM does not join in this statutory claim.[49]

The Commission squarely rejected DNC's statutory argument as running "counter to the statutory language and the legislative history."[50] In *Red Lion* this Court stressed the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong."[51] There are no such "compelling indications" in this case. As we now discuss, the statutory language and legislative history of the Act and prior Commission decisions confirm the correctness of the Commission's conclusion, and no amount of deference to the principle of avoiding difficult constitutional issues can justify a different interpretation.[52] Indeed, even the court of appeals—which found that an "abridgeable" constitutional right of access would be consistent with the Communica-

[48] DNC Br. 17-34.

[49] BEM relies entirely upon constitutional arguments in its brief to this Court, although it discusses a number of statutory issues at some length in connection with these contentions. BEM Br. 40-49, 64-68.

[50] App. 260.

[51] 395 U.S. at 381.

[52] This Court has repeatedly held that "avoidance of a [constitutional] difficulty will not be pressed to the point of disingenuous evasion." *George Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 379 (1933). See also *Aptheker* v. *Secretary of State*, 387 U.S. 500, 515 (1964); *Scales* v. *United States*, 367 U.S. 203, 211 (1961).

tions Act—expressly determined that a decision on non-constitutional grounds "is neither fruitful nor possible here" and found that respondents had failed to present any "compelling evidence" to support their reading of the statute.[53]

A. DNC Is in Error in Suggesting that the Commission Has Here Departed from its Long-Standing Interpretation of the Public Interest Standard of the Act.

DNC rests its argument principally on the remarkable assertion that the Commission's refusal to recognize a statutory right of paid partisan access represents an attempt "to overturn its previously established rule" and an intolerable example of "regulatory inconstancy."[54] As evidence of an alleged "long-standing" Commission recognition of a right of paid access, DNC relies upon five early cases decided before the Commission's definitive articulation of the fairness doctrine in its 1949 *Report on Editorializing*.

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[53] App. 454, 455. Despite the decisiveness with which the court of appeals rejected the statutory right-of-access argument, DNC asserts that the court "found in the Communications Act an alternative basis for its holding." DNC Br. 18. In support of this strained reading of the court's opinion, DNC quotes only the final sentence of the following passage from the decision and conspicuously omits the italicized material:

> "What then must be the 'compelling indications' we are to consider? The ones which seem to us truly 'compelling' involve First Amendment principles. Thus we conclude that *the constitutional question must be faced and is, indeed, the essence of these cases.* Whether our decision is styled as a 'First Amendment decision' or as a decision interpreting the fairness and public interest requirements 'in light of the First Amendment' matters little." App. 455 (emphasis added).

What the court was saying in the sentence quoted by DNC was not that the fairness and public interest requirements of the Communications Act create a right of paid access independent of the First Amendment, but that they must be read to incorporate any constitutional right which the court might find to exist.

[54] DNC Br. 27.

These decisions lend no support to DNC's contention. Three of the cases—*Sam Morris*, 11 F.C.C. 197 (1946), *Robert Harold Scott*, 11 F.C.C. 372 (1946), and *Homer P. Rainey*, 11 F.C.C. 898 (1947)—do not in any way suggest that there is a right of paid access to the broadcast medium and have absolutely nothing to do with this case.[55] In the other two cases—*United Broad-*

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[55] In *Morris*, petitioner charged a licensee and network with selling time for beer and wine commercials while refusing to sell time for the advocacy of abstinence. The Commission warned that such advertising could raise controversial public issues requiring the presentation of contrasting views; but it did not suggest that the Communications Act required licensees to *sell* time for the discussion of abstinence or any other controversial issue.

In *Scott*, the petitioner charged that certain licensees had refused to sell or make available time for the discussion of atheism while simultaneously broadcasting direct and indirect attacks on atheists by various religious groups. Although the Commission severely criticized the licensees for interpreting their public interest obligation to permit them to refuse to broadcast views likely to prove distasteful to their audience, it did not suggest that there was any obligation on the licensee to *sell* time to petitioner or any other spokesman.

In *Rainey*, a candidate for public office complained that certain licensees had published adverse material in newspapers which they owned and at the same time had refused to present the views of the petitioner on their broadcast facilities. The licensees agreed to abandon their policy of limiting candidate appearances and, on this basis, the Commission determined that no sanctions were warranted. In passing, the Commission noted that stations were obligated to afford time for discussion of controversial public issues *either* on a free or paid basis. It did not suggest that a licensee was required to *sell* time for the discussion of controversial issues.

DNC's reliance on several out-of-court settlements as support for its position (DNC Br. 21-22) is similarly misplaced. There is nothing to indicate that these controversies involved requests to purchase time. See L. WHITE, THE AMERICAN RADIO 175 (1947).

In a footnote, DNC also cites the Commission's more recent decisions in *City of Jacksonville*, 21 F.C.C. 334 (1956), and *Loyola University*, 12 Pike & Fischer R.R. 1017 (1956). DNC Br. 24 n.28. Both cases involved a licensee policy of refusing to cover local political campaigns on *either* a free or paid basis in violation of

casting Co., 10 F.C.C. 515 (1945), and *Albuquerque Broadcasting Co.*, 3 Pike & Fischer R.R. 1820 (1946)—the language concerning the purchase of time was dicta which was later repudiated by the Commission.

All five cases were decided between 1945 and 1947, during a time when the basic principles of the fairness doctrine were still developing. At various points during this period, the Commission seemed to emphasize the role of the broadcaster as a conduit rather than as a journalist. A significant step in this direction was the decision in *Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1940), which barred editorializing by licensees.[56] With the *Mayflower* rule still in full force and effect, the Commission decided *United Broadcasting Co., supra*, the case upon which DNC principally relies.

In *United Broadcasting* petitioners complained that the licensee had applied a policy against selling time for discussion of controversial issues "strictly to those with whom the management . . . disagree[d] . . . and loosely or not at all with respect to others." [57] The Commission approved an agreement between the parties under which the station undertook to make time available for the discussion of issues "primarily on a sustaining basis" and to maintain balance among various points of view.[58] The Commission rested its approval of this agreement

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the public interest obligation to provide adequate coverage of issues of significant importance to the community. As in *Morris, Scott*, and *Rainey*, the Commission nowhere indicated that the licensees were required to *sell* time for discussion of controversial public issues. Similarly, in *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525 (1959), relied on by DNC (pp. 25-26), this Court did no more than suggest that "political broadcasts" must be carried on a free or paid basis.

[56] See L. WHITE, THE AMERICAN RADIO 176-78 (1947).

[57] 10 F.C.C. at 515.

[58] 10 F.C.C. at 517.

squarely on a fairness doctrine rationale, holding that licensees have a duty "to be sensitive to the problems of public concern in the community and to make sufficient time available, on a non-discriminatory basis, for a full discussion thereof . . . ." [59] Only in dicta did the Commission declare that the public interest prohibited even a uniformly applied ban on the sale of time for discussion of controversial issues.[60]

Whatever importance broadcasters and trade journals ascribed to the dicta of *United Broadcasting*,[61] the Commission itself never regarded it as significant. In its report on *Public Service Responsibility of Broadcast Licensees* (1946) (the "Blue Book"), handed down less than a year after *United Broadcasting*, the Commission listed a number of continuing regulatory problems in the area of public issues discussion, including whether time should be permitted or required to be sold for presenting views on public issues and, if so, "what precautions are necessary to insure that the most time shall not gravitate to the side prepared to spend the most money." [62] Citing *Mayflower* and *United Broadcasting*, the Commission then proceeded to declare:

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[59] *Id.*

[60] 10 F.C.C. at 518.

[61] See DNC Br. 21.

[62] *Blue Book* at 39. The Commission delineated some of the unanswered problems relating to the sale of time for public issue advertising as follows:

> "(1) Shall time for the presentation of one point of view on a public issue be sold, or shall all such presentations of points of view be on sustaining time only?
>
> * * * *
>
> (3) If time is also on occasion to be sold for presentation of a point of view, what precautions are necessary to insure that the most time shall not gravitate to the side prepared to spend the most money?
>
> * * * *

[Footnote continued on page 27]

> "The Commission has never laid down, and does not now propose to lay down, any categorical answers to such questions as those raised above." [63]

Obviously, the Commission regarded the dicta in *United Broadcasting* as something less than a definitive interpretation of the public interest requirement of the statute.

The *Blue Book* reflected the Commission's continuing inquiry in the mid-1940's as to the best manner of insuring the full and fair presentation of controversial public issues. It was during this period, less than three months after the issuance of the *Blue Book*, that the Commission decided the final case relied upon by DNC, *Albuquerque Broadcasting Co., supra.* This one and one-half page informal letter ruling involved a request for advice concerning the obligations imposed upon licensees by the sponsorship identification provision of the Communications Act, 47 U.S.C. § 317. As in *United Broadcasting*, the Commission's passing suggestion regarding the right to purchase broadcast time was dicta.

Significantly, during this same period the courts left no doubt as to their understanding of the public interest requirement of the Communications Act. In *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946), a case decided just five months after *United Broadcasting*, the court held that recognition of a right on the part of a religious organization to purchase time from a broadcast licensee would be inconsistent with the statute: "It is clear from

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[62] [Continued]

> (18) When a station refuses time on the air requested for the discussion of public issues, should it be required to state in writing its reasons for refusal? Should it be required to maintain a record of all such requests for time, and of the disposal made of them?" *Blue Book* at 39-40.

[63] *Id.* at 40 (emphasis added).

the history and interpretation of the Federal Communications Act that the choice of programs rests with the broadcasting stations licensed by the FCC . . . . Congress has confided the selection of program material to be broadcast to the taste and discrimination of the broadcasting stations." [64] See also *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950).[65]

The Commission clarified its own position just four years after its *United Broadcasting* decision. In 1949 it issued its landmark *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, a document which this Court has characterized as "the principal summary of [the Commission's] *ratio decidendi* in cases in this area." [66] There, the Commission definitively interpreted the public interest standard of the Communications Act as requiring licensees to cover significant public issues and present contrasting views concerning them.[67] At the same time the Commission stressed that "the foundation stone of the American system of broadcasting" is the "right of the public to be informed, rather than any right on the part of . . . any individual member of the public to broadcast his own particular views on any matter . . . ." [68] The Commission also emphasized the importance of licensee discretion:

> "[O]ur system of broadcasting . . . imposes responsibility in the selection and presentation of radio

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[64] 151 F.2d at 599-600.

[65] See also *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Regents of New Mexico College of Agricultural & Mechanic Arts* v. *Albuquerque Broadcasting Co.*, 158 F.2d 900, 906 (10th Cir. 1947); *Pulitzer Pub. Co.* v. *FCC*, 68 App. D.C. 124, 126, 94 F.2d 249, 251 (1937).

[66] *Red Lion, supra*, 395 U.S. at 384.

[67] 13 F.C.C. at 1249.

[68] *Id.*

> program material upon . . . licensees . . . . It is the licensee, therefore, who must select or be responsible for the selection of the particular news item to be reported or the particular local, state, national or international issues or questions of public interest to be considered, as well as the person or persons to comment or analyze the news or to discuss or debate the issues chosen as topics for radio consideration." [69]

The *Report on Editorializing* carefully limited earlier decisions seemingly at variance with these principles. Thus, while holding that the public interest requirement did not bar broadcasters from editorializing, the Commission cited *Mayflower Broadcasting Co., supra*, for the proposition that, in the presentation of news and comment, licensees "must operate on the basis of overall fairness . . . ." [70] The Commission similarly described *United Broadcasting* as a case recognizing the duty of the licensee to make "reasonable provision for the discussion of controversial issues of public importance in the community served, and to make sufficient time available for full discussion thereof." [71] This Court took an identical view of *United Broadcasting* in its *Red Lion* decision, citing the earlier case only for the proposition that "the broadcaster must give adequate coverage to public issues." [72]

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[69] 13 F.C.C. at 1247.

[70] 13 F.C.C. at 1250.

[71] 13 F.C.C. at 1249. The Commission cited the cases of *Sam Morris, supra*, and *Robert Harold Scott, supra*, as decisions simply requiring licensees fully and fairly to cover controversial public issues without regard to the personal views of the licensee or any determination by the licensee as to the possible unpopularity of the views among elements of the listening audience. 13 F.C.C. at 1249-50. The Court of Appeals for the District of Columbia Circuit similarly construed *Morris* in *Banzhaf* v. *FCC*, 132 U.S. App. D.C. 14, 24 n.34, 405 F.2d 1082, 1092 n.34 (1968), *cert. denied*, 396 U.S. 842 (1969).

[72] 395 U.S. at 377.

Since the issuance of the *Report on Editorializing*, the Commission has never interpreted the public interest standard of the Communications Act to require a licensee to sell time for the purpose of discussing public issues. In *Letter to Women's Strike for Peace*, decided Nov. 25, 1965, the Commission squarely rejected a claim of an individual right to purchase advertising time for the presentation of views on controversial issues, finding that such a requirement would be inconsistent with the Communications Act.[73] As stated in *Boalt Hall Student Ass'n*, 20 F.C.C.2d 612, 615 (1969):

> "[T]he cornerstone of the fairness doctrine is not the right of any particular individual or group to speak but rather the public's right to be informed as to all significant points of view relating to an issue of public importance."

Again, in *Letter to Rep. Ottinger*, 18 Pike & Fischer R.R.2d 1031, 1032 (1970), the Commission declared: "A person or group cannot demand that as a matter of right its message be presented over the station's facilities."[74]

The preceding history of administrative and judicial interpretation of the public interest standard of the Communications Act reveals the lack of merit in DNC's assertion that the Commission's holding below constituted "regulatory inconstancy" and a departure from "long-standing practice." Since the repudiation of the early dicta in *United Broadcasting* some twenty-three years ago, and despite a prevalent broadcaster practice of satisfying fairness doctrine obligations without selling time for discussion of controversial issues, the Commission has never intervened to require the sale of advertising time for this purpose.

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[73] See App. 366.

[74] See also *Mrs. Margaret L. Scherbina*, 21 F.C.C.2d 141, 143 (1969); *Democratic State Central Committee of California*, 19 F.C.C.2d 833, 834 (1968); *Mrs. Madalyn Murray*, 40 F.C.C. 647 (1965).

B. The Legislative History of the Communications Act Lends No Support to DNC's Position.

DNC argues alternatively that the Commission's rejection of a right of paid access is inconsistent with Section 326 of the Communications Act, 47 U.S.C. § 326, and the legislative history of the Act generally.[75]

The precise nature of DNC's argument concerning Section 326 is not entirely clear. At times DNC appears to make the novel contention that this provision, specifically directed at protecting licensees from censorship by the Commission, operates against licensees to compel the sale of time for discussion of controversial public issues.[76] Elsewhere DNC seems to argue simply that Section 326, evidencing a "statutory commitment to a system of broadcasting consistent with the First Amendment," somehow buttresses an interpretation of the public interest requirement as creating a right of access.[77] Neither of these propositions withstands analysis.

Section 326 neither directly commands nor indirectly suggests that the refusal of broadcasters to sell time for the presentation of partisan announcements is impermissible. No fair reading of its language, so obviously directed at protecting licensee discretion from governmental intrusion, can ascribe to Section 326 a purpose of restricting the discretion of broadcasters,[78] and the Commission

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[75] DNC Br. 27-34.

[76] DNC Br. 30.

[77] DNC Br. 27-28.

[78] The section provides:

> "Nothing in this Act shall be understood or construed to give *the Commission* the power of censorship over radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed *by the Commission* which shall interfere with the right of free speech by means of radio communication." (Emphasis added.)

has held specifically that Section 326 does not operate as a limitation upon licensee conduct.[79]

Section 326 of the 1934 Act is a verbatim restatement of the first two sentences of Section 29 of the Radio Act of 1927, a provision which first appeared in the Senate bill.[80] The provision was only mentioned once during the Senate hearings, and never in connection with the question of "private censorship."[81] On the Senate floor, debate concerning the section dealt solely with the extent of protection provided against Commission censorship.[82]

While the House bill contained no specific anti-censorship provision, the problem of possible interference with free speech received considerable attention, principally because of a fear of government censorship. During the course of hearings, Representative Reid expressed apprehension that the Secretary of Commerce would use his licensing authority to influence broadcast programming, but Representative White, draftsman of the House bill, made it plain that the Secretary was not to use his power

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[79] *Letter to Judy Collins*, 31 F.C.C.2d 848 (1970). See also *Letter to Tracy A. Westen*, dated July 19, 1972; *Letter to Rep. Harsha*, 31 F.C.C.2d 847 (1971); *Letter to Albert H. Kramer (Back Alley Theatre)*, 25 F.C.C.2d 705, 707 (1970); *Letter to Rep. Ottinger*, 18 Pike & Fischer R.R.2d 1031 (1970).

[80] *Hearings on S. 1 & S. 1754 before the Senate Committee on Interstate Commerce*, 69th Cong., 1st Sess. 4 (1926); S. REP. NO. 772, 69th Cong., 1st Sess. 4 (1926). As reported to the Senate, the anti-censorship section contained the concluding proviso "except as specifically stated and declared in this act." The conference committee ultimately dropped this clause, evidently on the ground that the Act created no exceptions to the general proposition. See S. DOC. No. 200, 69th Cong., 2d Sess. 12-13 (1927).

[81] *Hearings on S. 1 & 1754, supra*, at 121.

[82] For example, in response to a charge that the bill gave the Commission power to censor anything but religion, Senator Dill, a principal architect of the legislation, responded that the bill expressly prohibited Commission censorship of any kind. 67 CONG. REC. 12615 (1926).

for such a purpose.[83] On the House floor, Representative White again felt compelled to reassure members that, even without a specific anti-censorship section, the Secretary would have "no power at all" to interfere with broadcasters' freedom of speech.[84]

To be sure, Congress had before it several proposals to limit the programming discretion of broadcasters. Thus, an earlier version of the House bill contained a provision giving the Secretary of Commerce power to establish a system of priorities for the selection of programming.[85] Representative White omitted the section from his substitute bill for fear that it would provide government with a power "akin to censorship." [86]

The most far-reaching proposals presented to Congress to eliminate the threat of "private censorship" were those which would have treated broadcasters as common carriers by forbidding them to discriminate in the sale of time for discussion of public issues. Both Secretary of Commerce Hoover and Representative Davis, upon whose statements DNC so heavily relies, were principal proponents of such treatment.[87] Congress specifically re-

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[83] *Hearings on H.R. 5589 before the House Committee on the Merchant Marine & Fisheries*, 69th Cong., 1st Sess. 26 (1926).

[84] 67 CONG. REC. 5480 (1926).

[85] *Hearings on H.R. 5589, supra*, at 39-40.

[86] *Id.*

[87] Following his remarks concerning the alleged dangers of private censorship (see DNC Br. 28), Secretary Hoover declared: "Radio communication . . . is a public concern impressed with a public trust, and to be considered primarily from the standpoint of public interest *to the same extent and upon the basis of the same general principles as our other public utilities.*" Quoted at 67 CONG. REC. 5484 (1926) (emphasis added). Representative Davis quoted these remarks of Secretary Hoover on the floor of the House and then acknowledged: "That is all I am asking. I am asking that the radio interests that are engaging in the business for profit or hire

jected this common-carrier proposal,[88] and the statements of its proponents—whatever applause they may have received[89]—can hardly serve as a guide to Congressional intent. As this Court stated in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951): "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt."[90]

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be treated in this legislation as public utilities and regulated accordingly." 67 CONG. REC. 5484 (1926) (emphasis added).

DNC also quotes a statement by Representative Free to the effect that broadcasters only sought the right to edit out slanderous and seditious statements. DNC Br. 29. While this may have been Mr. Free's interpretation of the testimony given during the hearings, other members on the floor immediately and vigorously contested such a reading. 67 CONG. REC. 5491 (1926) (remarks of Rep. Celler). See also 68 CONG. REC. 2567 (1927) (remarks of Rep. Davis). Moreover, the hearing transcript, quoted by Representative Davis on the House floor, failed to support Mr. Free's view. 67 CONG. REC. 5484 (1926).

[88] 67 CONG. REC. 12501-05 (1926); 68 CONG. REC. 2570-80 (1927).

While generally rejecting a common-carrier approach, Congress did adopt Section 14 of the Radio Act which permitted the Commission to revoke a station's license upon a finding by the Interstate Commerce Commission that the licensee was "guilty of any discrimination either as to charge or as to service." 44 Stat. 1168 (1927). In response to a complaint by Representative Davis that such a section would be largely meaningless in view of the ICC's declared intention not to exercise jurisdiction over broadcasting, Representative Scott, leader of the House conferees, refused to strengthen the provision, arguing that even in so limited a form it came dangerously close to a governmental abridgement of free speech. 68 CONG. REC. 2567 (1927). Davis' prediction that the section would be ineffective proved accurate—in *Sta-Shine Prods. Co.* v. *Station WGBB*, 188 I.C.C. 271 (1932), the ICC held that it lacked jurisdiction over broadcasting—and Congress deleted the provision when it adopted the 1934 Act.

[89] See DNC Br. 29.

[90] See also *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 639-40 (1967); *NLRB* v. *Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66 (1964); *Mastro Plastics Corp.*

Looking to the proponents of the bill ultimately enacted as the Radio Act, we find that, contrary to DNC's contention,[91] Congress rejected the common-carrier proposals because it believed they would unduly restrict the discretion and responsibility of licensees. Thus, in arguing against adoption of a common-carrier provision, Senator Dill, the major architect of the Senate bill, stated:

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v. *NLRB*, 350 U.S. 270, 288 (1956) ("An unsuccessful minority cannot put words into the mouths of the majority and thus indirectly amend a bill.")

[91] According to DNC, the original inclusion of the common-carrier provision in the Senate bill merely reflected the opinion of some Senators that such a clause was required to give Congress constitutional power to regulate radio transmissions and to indicate that the Interstate Commerce Commission would retain limited jurisdiction over certain aspects of broadcasting. DNC suggests that the rejection of the common-carrier provision simply shows that Congress as a whole regarded the provision as unnecessary for either purpose. DNC Br. 32.

Such an interpretation of the legislative history of the common-carrier provision is, in fact, highly misleading. Although certain members of Congress may have believed that a common-carrier section was necessary to establish Congress' regulatory power or to stress the continuing role of the ICC, the debate in both Houses on the subject centered almost entirely on the question of whether the common-carrier provision was needed to curb "private censorship." 67 CONG. REC. 5483-84 (remarks of Rep. Davis), 5491 (remarks of Rep. Free), 12501-04 (remarks of Sen. Dill), 12504-05 (remarks of Sen. Howell) (1926); 68 CONG. REC. 2567 (remarks of Rep. Scott), 2571-73 (remarks of Rep. Davis) (1927). See also p. 32, *supra*.

Equally unfounded is DNC's contention (DNC Br. 32-34) that Congress' rejection of the common-carrier provision indicated merely a concern that the common-carrier approach would turn the airwaves over entirely to commercial advertisers. Thus, for example, DNC relies upon a statement by Senator Broussard expressing fear that adoption of the common-carrier provision would result in a domination by commercial advertisers. DNC Br. 32-33. But Senator Howell, a common-carrier proponent, immediately responded that the common-carrier proposal was not designed to have any impact upon the relationships between broadcasters and commercial advertisers: "I call the attention of the Senator from Louisiana [Mr. Broussard] to the fact that, so far as advertisements are concerned, under this bill . . . radio is not to be deemed a common carrier." 67 CONG REC. 12504 (1926).

> "[U]nder the common-carrier provision a radio station is compelled to take *any kind of broadcasting that anybody wants to offer*, which would mean that it would take anybody who came in order of the person presenting himself and would be compelled to broadcast for an hour's time *speeches of any kind they wanted to broadcast.*
>
> * * * *
>
> When we recall that broadcasting today is purely voluntary, and the listener-in pays nothing for it, that the broadcaster gives it for the purpose of building up his reputation, it seemed unwise to put the broadcaster under the hampering control of being a common carrier and compelled to accept *anything* and everything that was offered so long as the price was paid." [92]

Similarly, Representative Scott, the leader of the House conferees, argued against a common-carrier approach on the ground that Congress would be "trespassing very closely to sacred ground [in attempting] . . . to control the right of free speech" of broadcasters.[93] Thus, in refusing to adopt the common-carrier proposals, Congress was deliberately rejecting a system of paid partisan access such as that imposed by the court of appeals in this case. Congress made its rejection of a system of paid access even more explicit in 1934 when it enacted Section 3(h) of the Communications Act, 47 U.S.C. § 153(h), declaring that a broadcaster "shall not . . . be deemed a common carrier." [94]

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[92] 67 CONG. REC. 12502 (1926) (emphasis added).

[93] 68 CONG. REC. 2567 (1927).

[94] See CBS Br. 29, 32. The very remarks which DNC quotes from the legislative history of the Communications Act (DNC Br. 30) actually demonstrate that the Congressional concern regarding censorship related to the danger of government pressure upon broadcasters. Representative Culkin's comments concerning the importance of Section 326 as a guarantee of free speech were made in response to complaints that broadcasters had refused to present the views

This Congressional intent is clearly confirmed by provisions that the Congress wrote into Section 315 of the statute. Prior to its amendment earlier this year, Section 315(a) of the Communications Act, like the analogous provision of the Radio Act, required licensees to afford all legally qualified candidates equal opportunities to utilize station facilities, but provided: "No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate." It is inconceivable that the Congress would have denied rights to purchase time to candidates if it believed that the Act conferred such rights on the general public.[95]

The amendment of Sections 315 and 312 by the Federal Election Campaign Act of 1971, 86 Stat. 3 (1972), further confirms Congress' intention not to confer any general rights of paid access to the broadcast medium. In this legislation, Congress revised the original proviso to Section 315 and amended Section 312 to authorize the Commission to revoke the license of a station which willfully or repeatedly fails "to allow reasonable access to or permit purchase of reasonable amounts of time" by candidates for federal office.[96] The enactment of this limited

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of opponents of the New Deal out of fear that the Radio Commission, at the behest of the Democratic administration, would refuse to renew their licenses. 78 CONG. REC. 10327-28 (1934). His comparison of the anti-censorship provision with the Magna Carta plainly indicates that it was regarded as imposing a restraint upon governmental interference.

[95] The additional proviso to Section 315 that licensees "shall have no power of censorship over the material broadcast under the provisions of this paragraph" further undermines DNC's argument that Section 326 operates to prohibit "private censorship." Obviously, if Section 326 barred licensee censorship generally, the narrowly limited prohibition in the proviso to Section 315 would be pure surplusage.

[96] Section 103(a)(2). The Senate bill created a right of reasonable access for all candidates, but the House conferees forced its restriction to candidates for federal office. See S. REP. NO. 580, 92d Cong., 1st Sess. 22 (1971); H.R. REP. NO. 752, 92d Cong., 1st Sess. 22 (1971).

provision again demonstrates the Congressional view that the Act creates no general rights of paid access to the air.[97]

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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[97] See also CBS Br. 7 n.12, 30-31 n.72.

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No. 71-865

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

POST-NEWSWEEK STATIONS,
CAPITAL AREA, INC.,
Petitioner,

v.

BUSINESS EXECUTIVES' MOVE
FOR VIETNAM PEACE,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.

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REPLY BRIEF FOR POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.

This reply brief is filed by Post-Newsweek Stations, Capital Area, Inc. ("WTOP"), in response to the brief filed by Business Executives' Move for Vietnam Peace ("BEM").

I. BEM'S ARGUMENTS ARE DIRECTED NOT TO SECURING ITS OWN INTERESTS IN FREE SPEECH, WHICH HAVE NOT BEEN IMPAIRED, BUT TO PROMOTING GENERAL POLICY CHANGES IN BROADCASTING OPERATIONS BASED ON UNPROVED AND DISPUTED FACTUAL PREMISES.

BEM has not been denied an opportunity to use radio broadcasting to air its editorial advertisements. At least five stations in the District of Columbia area have carried BEM's announcements (A. 329). There is nothing in the record to indicate that BEM has been or would be unable to secure air time on a number of other stations among the 43 stations that serve the area if it wished to do so (see A. 329). No basis exists for suggesting that editorial advertisements must be made compulsory for WTOP in order to satisfy BEM's desire to use the airwaves to convey its message.[1]

Similarly, WTOP's audience has not been denied access to BEM's views. That audience is not a discrete group which is insulated from other stations or other media and can be reached solely by broadcasts on WTOP. In any event, the very views embodied in BEM's advertisements were "expressed on a number of occasions in various types of broadcasts over WTOP" (A. 352), and WTOP provided substantial coverage of the range of partisan viewpoints and opinions about the Vietnam war (A. 313-15, 352; see A. 360-64). Although BEM once claimed that WTOP had not fairly presented the BEM

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[1] While BEM now asserts that WTOP's audience is "unique" in terms that suggest that such listeners can be reached only over WTOP (BEM Br. 3, 77-78), BEM made no effort to establish this assertion when the case was before the Commission and it certainly cannot do so in the appellate courts.

viewpoint on the war (A. 292-94)—a claim rejected by the Federal Communications Commission on the record—it abandoned that charge below as its own brief now concedes. BEM Br. 7, n. 12.

In short, BEM has not been prevented from broadcasting its views and WTOP's audience has been exposed by broadcasts on that station to BEM's viewpoint. There is thus strikingly absent in this case the kind of concrete interference with personal self-expression or with the receipt of information by an audience that is the gravamen of free speech claims. BEM's argument reflects its discomfort with the particular circumstances of this case. It is directed to the general policy on editorial advertising maintained by WTOP and various other stations which BEM believes should be altered by the stations and replaced by a uniform regime it considers to be wiser and more desirable.

BEM's argument rests importantly on general factual propositions that have nothing to do with what happened in this case. Thus, BEM argues that the fairness doctrine is inadequate to curb alleged abuses by broadcasters (BEM Br. 33-40); that editorial advertising is a fair and efficient way to promote coverage of public issues (*id.* 49-54); and that no adverse effects worth weighing will result from the regime that BEM advocates (*e.g.*, *id.* 59-61). Such arguments would be familiar grist in a congressional revision of the Communications Act or in the FCC investigation of the fairness doctrine now underway, but they have no bearing on the question whether WTOP's action in this case has infringed BEM's constitutional rights. Moreover, the caricature of broadcasting offered by BEM's brief would not be a sound basis for any regulatory measure. The propositions advanced by BEM are based on a one-sided picture of the

broadcast industry and reflect serious misconceptions about broadcast operations.[2] The very incidents used to demonstrate the propositions are in a number of cases described inaccurately or in misleading terms.

Thus, to prove the supposed abuses of broadcasters under the fairness doctrine, BEM's brief provides a page of examples to show how "controversial subjects" have been "avoided" by broadcasters. BEM Br. 37, n. 55. The very first example is a capsule description of *Communication Workers of America*, 31 F.C.C. 2d 841 (1971), phrased to suggest that a labor union was prevented by two networks from making known its views on a major labor settlement. In fact, the union had purchased time for this purpose on a number of other stations in the same communities. *Id.* Furthermore, the messages were basically directed not to informing the listening public but to encouraging union members to follow the union's policy on contract ratification. See 31 F.C.C.2d at 841-42. With these clarifications, the incident hardly shows that the union was denied access to the airwaves or that the public was deprived of adequate information on public issues. What the example does principally

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[2] DNC, in addition to abusing broadcasters at large, goes a step beyond in seeking to describe the industry as though it consisted of three networks jointly controlling all news and informational programs. See, *e.g.*, DNC Br. 14, 44-45, 51, 61. In fact, there are over seven thousand radio and television broadcast stations in this country (see WTOP's opening brief at 54 n. 56) and most of them have no connection with the major networks. WTOP and WTOP-TV, although network affiliates, carry far more locally originated news than network news. Needless to say, DNC does not attempt to support its generalizations or assumptions about the role of the networks with any concrete data.

demonstrate is the hazards of proof by selective sampling in an appellate brief.[3]

BEM's advocacy of editorial advertising is also based on a shaky factual foundation. For example, BEM cites advertising rates of several stations to prove that a small sum will enable the editorial advertiser to communicate with thousands of listeners. BEM Br. 4. The illustrations aim to show that such advertisements are an efficient vehicle for the less affluent and that no real risk exists that editorial advertising would be dominated by the wealthy. *Id.* 50-54. BEM's beguiling price data overlooks an obvious fact of broadcast advertising; the cost of an effective advertising campaign is not established by the price of an individual 30 or 60 second spot; virtually any effective campaign requires repetition of such spots at predetermined times in substantial numbers.[4] The cumulative cost of an advertising campaign on radio is many times the individual figures offered by BEM, and it is vastly greater for television.

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[3]Even more tendentious is an assertion, again dehors the record, in the same BEM footnote that WTOP's sister station in Jacksonville, Florida "reportedly" discharged a newsman "because he caused advertising account cancellations." The report, which appeared in a story in a news periodical, was in fact false. The periodical subsequently agreed not to permit the reprinting of the story.

[4]Consonantly, broadcast statistics are often given in terms of the cumulative listenership during a period. Thus, a station's "weekly cume" of listeners over 12 years of age (*e.g.*, WTOP pamphlet, reprinted as BEM Br. App. B) would include all persons in that category although many of them might listen only infrequently or for relatively brief and intermittent periods during the week. In order to have a significant chance to reach such listeners, a series of spots during the week would have to be broadcast.

BEM is, finally, unpersuasive in seeking to brush aside the danger that compulsory access would inundate the Commission and the courts with disputes over the sale of editorial advertising time, its placement, its cost, discrimination among advertisers, and countless other matters. When BEM asserts that a multitude of such disputes and their litigation is "a development . . . to be anticipated and welcomed" (BEM Br. 60), it betrays ignorance of the impact on broadcasting, not to speak of the effect on the Commission and the courts. The costs in station personnel time, diverted attention, and financial expense of this endless parade of major and minor controversies over what is and is not broadcast inevitably means that less time and resources can be devoted to assuring the scope and quality of a station's programming.[5]

The new access regime, if instituted, is likely to involve a far greater operational burden than that resulting from the fairness doctrine. A substantial number of new controversies may reasonably be expected to result from compulsory access;[6] the broadcast of editorial advertise-

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[5]The record in the DNC case graphically illustrates the burden already placed on broadcaster time and energy by such controversies. To establish its fair coverage in one area, a network obviously devoted hundreds of working hours to compiling an exhibit running well over a hundred pages and covering months of broadcasts. See A. 81-242.

[6]The fairness doctrine imposes an obligation running to the public which is satisfied by balanced coverage. BEM's asserted right is personal to individuals and groups and—as the present case illustrates—can be pursued even though the station has provided fair coverage of the issue. Needless to say, neither the present volume or quality of editorial advertisements on stations that carry them now is any index of what would occur if all stations were required to carry them with few, if any, restrictions on content.

ments itself may result in still further obligations and create additional disputes;[7] and the flexibility that made the fairness doctrine workable would disappear in a panoply of inflexible rules which BEM's own brief prefigures and which would embroil the Commission and the courts in repeated constitutional determinations. See pp. 25-26, *infra*. For BEM to brush aside the practical consequences of a new complex of guidelines and controversies upon the day-to-day operations of broadcasters does not reflect an understanding, let alone a serious appraisal, of the matter.

Virtually from the start of the case advocates of editorial advertising have oscillated from one position to another in seeking to answer the practical objections to their regime, often abandoning successive positions as objections to them are raised. Thus, for example, BEM asserted at the outset that it was simply a regrettable circumstance if editorial advertising led to domination of the issues by the wealthy.[8] BEM's most recent brief in this Court asserts, however, that the licensee can make selections that will avoid this problem (BEM Br. 52-53)

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[7] Unless the fairness doctrine is suspended, such advertisements may require changes in the station's other programming. The possible application of *Cullman* would give rise to further problems relating to whether and when a station was financially liable for such changes. Moreover, each such broadcast widens the opportunity for charges of discrimination if subsequent advertisements from other sources are rejected.

[8] BEM stated:

> "WTOP worries that, if stations must sell air time for issue-oriented advertisements, editorial advertising will be dominated by wealthy speakers. But this is what commercial broadcasting is all about; he who can afford it buys time, be it for commercial, political, or other purposes" (A. 347).

and that the licensees are required, in any event, "to cover fairly all representative viewpoints." *Id.* 57. Yet in the same brief BEM casts substantial doubt on the propriety of any licensee discretion (see pp. 25-26, *infra*) and it announces that the *Cullman* doctrine, a significant aspect of the fairness obligation, could be suspended in part. *Id.* 58. This last prospect—apparently a semi-fairness obligation—appears finally to bring BEM to a third position, halfway between its original extremes, but no more workable than either.

Beyond the particular misconceptions or incomplete analyses, there is a more basic problem in BEM's method. The factual premises BEM now relies on have not been submitted by BEM to the agency having expert responsibility for broadcasting. Almost none of the episodes and incidents BEM advances here to impeach the fairness doctrine was mentioned when this case was before the Commission. BEM never sought to prove at that stage that WTOP's audience was uniquely available through that station. The advertising cost data BEM offers and the factual inferences it draws have been tendered for the first time in this Court. In substance, BEM is now attempting, after the case has left the fact-finding level, to build a new record free from the constraints of agency scrutiny.[9]

This approach would be unsound even if the factual context were far less complicated than it is in this instance. The practical operation of the fairness doctrine,

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[9]The administrative record in this case shows that BEM's arguments to the FCC in favor of editorial advertisements were almost entirely doctrinal and with very few exceptions the incidents and data now comprising an important part of BEM's case were never presented to the agency. See, *e.g.*, A. 291, 320.

the actual costs of radio advertising campaigns, the relative uniqueness of or overlap among audiences of different radio stations, and the consequences of increased agency and court regulation for broadcasters are not matters to lend themselves to hasty appraisal made on the basis of selective examples in an appellate brief. If issues of this kind are to be evaluated, it should be done in the first instance in proceedings before the Commission and subject to judicial review only after the initial agency screening process has been completed.

BEM's effort to compose its record in the course of an appeal in this case is ironical because the agency is now engaged in a broad-gauged proceeding to evaluate the fairness doctrine and consider alternatives such as editorial advertising. *Study of Fairness Doctrine*, 30 F.C.C. 2d 26 (1971). The Commission is there considering the very issues BEM seeks to resolve in this case on the basis of untested factual assertions that it supports, if at all, on the basis of selected examples. The current Commission proceedings are the forum in which BEM can properly seek to impeach the fairness doctrine based on its practical operation and seek to show that editorial advertisements are so desirable a supplement that they should be made compulsory for all stations. When the Commission has made its determinations, any aggrieved party may seek review in the courts on the basis of an adequate administrative record.

In sum, BEM's doctrinal arguments must be considered without the coloration or reinforcement that might be lent to them if it were *in fact* established that the fairness doctrine did not operate effectively or that editorial advertising was a fair and workable tool for enhancing public understanding of complex issues. There is only one concrete episode that was litigated in the agency proceed-

ing in this case—WTOP's coverage of the Vietnam war. Having abandoned its claim that its own viewpoint was not fairly covered by WTOP, BEM is in no position to ask the Court to decide this suit on the basis of unproved allegations that broadcasters have in other cases failed to provide fair coverage of controversial issues.

II. THERE ARE NO DOCTRINES OR DECISIONS OF THIS COURT, INTERPRETING EITHER THE FIRST AMENDMENT OR EQUAL PROTECTION PRINCIPLES, THAT REQUIRE BROADCAST STATIONS TO ADOPT A GENERAL POLICY OF SELLING SPOT ANNOUNCEMENT TIME FOR EDITORIAL ADVERTISING.

BEM's doctrinal argument, like its "factual" one, is necessarily detached from the circumstances of this case. The Commission has not interfered with any arrangements between BEM and individual broadcasters; a number of stations in the District of Columbia area have carried BEM's messages; and WTOP's own listeners have been fully and fairly informed of the viewpoints expressed in those messages through various means including partisan voices. The present case is thus remote from the classic First Amendment cases, prolifically cited by BEM, in which the state has sought to prevent expression of an opinion based on the viewpoint expressed or style of expression, or in which it has invidiously favored one sect or viewpoint on a subject as against a conflicting one.[10]

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[10] *E.g.*, *Terminiello* v. *Chicago*, 337 U.S. 1 (1949) (riotous language); *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969) (antiwar protest); *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953) (preference among religious viewpoints); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951) (same).

Bypassing the circumstances of its own case and the factual differences between it and the decisions on which it relies, BEM seeks to derive from those decisions several abstract legal principles that it asserts entitle it to prevail without regard to whether it has broadcast its message on other stations or whether its viewpoint has been fairly communicated to WTOP's audience. One formula relied on by BEM is its right of "self-expression" (BEM Br. 24-29); another is a charge that broadcasters engage in "censorship" of ideas (*id.* 22-23); yet another is a supposed prohibition on every difference in treatment of speech based upon its "content" (*id.* 14-20). The generalizations BEM wrongly attributes to decisions of this Court do not withstand analysis.

It is understandable that BEM should heavily emphasize its interest in "self-expression" since it cannot claim that WTOP's audience has been deprived of access to ideas that BEM advocates. It hardly follows, however, that "an individual's interest in expressing [his ideas] and doing so in his own way" (BEM Br. 28, quoting the court below) is a mandate to command the use of a particular radio station. There is no general prohibition that prevents BEM from expressing its views on the Vietnam war in any medium it chooses including radio stations in the District of Columbia area, and it has in fact broadcast editorial advertisements on such stations. The question here is whether the Constitution requires an individual station to carry BEM's advertisements even though it has fully and fairly covered the same issues in other programming.

No decisions in this Court exalt BEM's interest in self-expression into a right to require that a particular printing press, microphone or other media facility be placed at its disposal. BEM's pastiche of quotations

derives from cases that are remote from the present subject and do not suggest even as dicta that self-expression overcomes every other competing value, interest or right.[11] Any contrary contention is especially inapt in the context of broadcasting. There this Court's leading decision in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), emphasizes that it is the public's interest as listeners which is "paramount" rather than private claims to use the microphone, whether they are made by broadcasters or by private "individuals who want to broadcast." 395 U.S. at 388-90.

BEM's repeated epithets against "censorship" (BEM Br. 22-24) are equally wide of the mark. The necessity of choosing among competing claims to broadcast time is inescapable in light of numerous proponents, limited spectrum space, the range of controversial issues deserving attention, the public's interest in hearing all sides of an issue, and other interests and constraints that affect the broadcast media. It is an abuse of language to describe as censorship a process in which thousands of broadcasters reach individual decisions about programming and broadcast policy, subject to limited oversight by the FCC and to review in the courts.[12] Censorship in

[11] For example, BEM cites *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), as recognizing "the individual's interest in access to the press." See BEM Br. 28 n. 42 and 376 U.S. at 266. Yet that decision, while qualifying restraints placed by the libel laws on newspapers carrying political advertising, also recognized the individual's interest in protection from deliberate or malicious falsehood implemented through "self-expression." Nothing in the opinion suggested that any newspaper was obligated by the First Amendment to carry the particular political advertisement there in question or any political advertising whatever.

[12] It is also fanciful for BEM to assert that within an individual station the licensee "arrogates for himself the right to speak for all the others" who hold controversial views (BEM Br. 11). A great

any meaningful sense—uniform government determination of what should and should not be said—is in fact made more likely by the decision below precisely because it threatens to bring about a greater involvement of the Commission in broadcaster decision-making. See WTOP Br. 29-33.

BEM's own brief recognizes that individual choices could not be avoided even if its own regime were adopted. BEM actually invokes broadcaster discretion in order to remedy dangers posed by its own regime, such as undue domination by a "narrow viewpoint," defamatory attacks on individuals, and economic hardship that would result if the *Cullman* doctrine were applied to editorial advertisements. See BEM Br. 52-61.[13] There is no logic to the contrapuntal theme of BEM's brief, condemning broadcaster discretion as "censorship" in one paragraph and invoking it in the next as an answer to deficiencies in BEM's proposals. BEM's qualifications on its rhetoric show that it is not relying upon any general doctrine proscribing broadcaster choice in presenting public issues

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range of individual opinions are expressed on WTOP by commentators, persons appearing on interview programs, subjects quoted in the news, officials and candidates whose speeches are broadcast, and similar advocates (see A. 313-15). Any listener or viewer knows that the same is true on other broadcast stations.

[13]For example, BEM asserts that "standards of deference to the reasonableness and good faith of the licensee could be operative" to implement the guidelines under its new regime, and it indicates that licensees should be able to adopt "reasonable regulations" relating to editorial advertising. BEM Br. 61 & n. 87. It states that a licensee who carries the editorial advertisements "could limit the number of such announcements . . . ." *Id.* 58. It also declares that "obviously licensees could prevent illegal materials such as obscene or defamatory editorials from being broadcast." *Id.* 63 n. 91.

but is instead advocating for them a different structure and format.

BEM repeatedly asserts that WTOP's policy of treating public issues in program time and not in advertising time constitutes an impermissible "discrimination" against public issues and in favor of commercial messages. WTOP showed in its opening brief (pp. 45-52) that this difference in treatment was not a discrimination in any invidious sense: the policy is reasonably designed to achieve a balance of conflicting views on controversial issues, to avoid discrimination among proponents of differing views, to promote rational exposition in preference to propaganda, and to minimize governmental intrusion into the broadcasting process. BEM does not seriously attempt to show that the station's policy lacks a rational basis.

Instead, BEM asserts flatly that it is impermissible for the government to make choices of any kind based upon "the *content* of the speech," so that it is *ipso facto* unlawful for a station to distinguish between spot announcements tendered to it depending upon whether they are commercial or editorial in nature. BEM Br. 16. See also *id.* 18-20. BEM's supposed constitutional doctrine is insupportable. It ignores the laws relating to obscenity, breach of the peace, and espionage. It conflicts with the long-standing distinction drawn by the Communications Act between the treatment of messages by or on behalf of candidates, which are governed by equal time requirements under Section 315, 47 U.S.C. §315, and most other public issues, which are subject to the fairness doctrine. It defies the decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), which upheld rules designed to establish a right of reply in certain limited categories of cases–candidate endorse-

ments and personal attacks–defined explicitly by their content. BEM elsewhere recognizes that distinctions based on content would have to be made by broadcasters (*e.g.*, to limit domination by particular viewpoints and to avoid defamation) even if its own regime were adopted (see p. 13, *supra*); as a matter of fact BEM's approach would greatly multiply the occasion for such choices by the stations and, accordingly, for oversight and intervention by the government.

BEM's principal authority for its position is *Police Department v. Mosley*, 40 U.S.L. Wk. 4877 (June 26, 1972). In that case this Court struck down an ordinance that, without plausible justification, permitted picketing near schools when addressed to certain labor disputes while prohibiting it in comparable circumstances when directed to any other issue. Here, WTOP's policy does not provide inferior treatment for the subject or viewpoint which concerns BEM nor for controversial issues taken as a class. The station's policy is reasonably designed to assure balanced and effective presentation of controversial issues and viewpoints and seeks to achieve the very objectives of the First Amendment. Thus, even if state action is attributed to WTOP, there is a world of difference between the situation here and that in the *Mosley* case.[14]

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[14] *Mosley* might be apt–assuming that a broadcast station were taken to engage in state action–if a station systematically and without justification excluded either a public issue or a viewpoint on such an issue from the airwaves. In the present case, of course, WTOP has established that it devoted extensive treatment to the Vietnam war and to the various positions taken on it including that of BEM. If this were not so, it would be unnecessary to reach the constitutional issue under *Mosley* since a remedy would lie under the fairness doctrine and related Commission requirements.

Contrary to BEM's assertion (BEM Br. 31-32), WTOP's policy does not prefer or elevate "commercial" advertising above "political" speech. Just as spot announcement time is confined to commercial messages, so political and other non-commercial subjects dominate program time, where commercial advertising is excluded. Partisan or committed voices are heard in programming, just as sponsors are in commercial advertising. Station controls are maintained on commercial messages and the time involved is not, as BEM suggests, relinquished for the advertiser to use as he will (WTOP Br. 51); similarly, program time must be subject to ultimate broadcaster control and responsibility.[15] In every meaningful respect–for example, the total amount of time devoted, the station's own efforts and expenditures, the attention paid to balance of viewpoints, and the ascertaining of community interests–public issues are treated with far greater favor than commercial messages.

In the present case WTOP has in fact expressed the very views advocated by BEM, together with the views expressed by many others holding different opinions about the Vietnam war. The constitutional deficiencies in BEM's argument would scarcely be less, however, even if the issue involved were one the station had reasonably determined in the exercise of journalistic judgment was

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[15] All broadcasting, whether programming or commercial messages, is the responsibility of the broadcaster. BEM's reference to "brokering" of station time (BEM Br. 32-33 n. 51) fails to mention that the station is required by the FCC to retain this responsibility even if another undertakes to assemble programming or advertising for particular periods of time. See *Masters Broadcasting Corp.*, 6 P & F R.R. 621 (1950); *Voice of Brooklyn, Inc.*, 8 F.C.C. 230 (1940).

one that need not be covered at all, in light of other subjects pressing for attention and the limited amount of time available to do them justice. No broadcast station could conceivably accommodate all of those who have causes to urge nor could it possibly provide substantial coverage of every one of the countless issues that might prove to be of interest to one segment of the community or another.[16] Under *Red Lion*, the critical requirement is that a reasonable effort be made to cover noteworthy subjects and, when a subject is treated by a station, a good faith effort be made to treat it fairly and effectively, just as WTOP has done in this instance.

Journalistic choices in broadcasting—whether they relate to the issue to be covered, the use of partisan or dispassionate speakers, or the format—involve a difficult and interrelated journalistic evaluation. The ultimate responsibility for the choices is lodged in independent broadcasters subject to the fairness doctrine and other substantial requirements imposed by the Commission. The alternative is to locate responsibility for these choices in the government itself, whether in an administrative agency or in the courts. The difficulties and dangers of this approach are the same regardless of what aspect of broadcasting is withdrawn from the individual station and committed to a centralized organ of government.

Unlike DNC, BEM does not make an independent argument that the public interest standard of the

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[16]Naturally a station could not, under its statutory obligation to operate in the public interest, arbitrarily choose to ignore an issue of genuine public concern. See *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994, 998 (D.C. Cir. 1966). No such action is involved here.

Communications Act compels the result reached below even if the Constitution does not.[17] For the reasons given in WTOP's opening brief (pp. 34-44), any such claim would be without merit in view of the very broad discretion confided to the Commission by the Communications Act; the thrust of the congressional policy embodied in Section 3 (h) of the Act, 47 U.S.C. § 153(h), providing that broadcasters are not common carriers; the Commission position followed for many years that the broadcaster bears responsibility for determining the manner and format of presenting issues, subject to the fairness doctrine and special statutory obligations; and the weighty policy arguments against the approach urged by BEM. These circumstances show that, whatever the Commission may decide as an exercise of its expert judgment in the current proceeding reevaluating the fairness doctrine, the Communications Act certainly does not compel the Commission to require the carriage of editorial advertisements.

BEM does, however, invoke three of the same FCC decisions principally relied upon by DNC to support its statutory argument.[18] Whereas DNC regards these decisions as a longstanding interpretation of the statute favorable to it, BEM invokes them as expressing a

[17] DNC also differs from BEM in suggesting in its brief (p. 8, n. 6) that the lower court's opinion requires the sale of program time as well as spot advertising time to those wishing to express their views on public issues. It is sufficient to note that the lower court confined itself to advertising time (A. 464-65), its equal protection rationale generally has no application to program time, and DNC filed no petition for certiorari so that it cannot attack the judgment below as unduly restrictive.

[18] *United Broadcasting Co.*, 10 F.C.C. 515 (1945); *Robert Harold Scott*, 11 F.C.C. 372 (1946); *Homer P. Rainey*, 11 F.C.C. 898 (1947).

principle that "the Commission cannot at this late date repudiate" in the absence of "some reasoned and compelling justifications" (BEM Br. 66-67 & n.95). It is not clear how BEM's claim, which is squarely grounded in the First Amendment (BEM Br. 1), can be advanced by citation to agency decisions construing statutory standards. In any event, the three cited decisions rendered over twenty-five years ago establish no principle that the Commission has abandoned here.

Two of these cases are so remote from the present matter, both in their facts and their statements, that they scarcely deserve discussion.[19] In the remaining case—*United Broadcasting*—the Comission dismissed a charge of station bias in light of a compromise between the complainant and the licensee. The Commission made general observations about the public interest which were not directed to editorial advertising as such and certainly the Commission did not hold that editorial advertisements must be sold.[20] To derive from that case any such

[19] In the *Scott* case, the Commission in dicta cautioned that the views of atheists should not be excluded from the airwaves because they were unpopular or held only by a small minority of people. In *Rainey*, the Commission dismissed a proceeding relating to political broadcasts after stating that time allocations for such broadcasts should be made with due regard to the demands of the public interest in the particular campaign. Both cases were directed to the fairness and adequacy of the coverage of particular subjects rather than the means or format involved.

[20] The principal language relied on by BEM is the statement that it would not comport with the public interest to refuse to sell any time for the discussion of controversial public issues. 10 F.C.C. at 518. Taking the decision as a whole, it reveals that the Commission's basic concern was with the balanced and effective coverage of public issues and not with whether the station achieved this end by selling time or through other coverage which assured a balance of partisan viewpoints on controversial issues. In fact, the

obligation to sell time for editorial advertising would be inconsistent with the approach taken by the Commission in decisions both before and since *United Broadcasting*. WTOP Br. 37-38. In any event, the Commission has thoroughly and reasonably explained the reasons for its position in the present case and could not be foreclosed by *United Broadcasting* however its dicta there were read today. See *American Trucking Ass'ns, Inc. v. Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967).

III. RECENT DECISIONS OF THIS COURT CONFIRM THAT THE STATE ACTION CONCEPT DOES NOT PROPERLY APPLY TO BROADCASTING POLICY JUDGMENTS MADE BY INDIVIDUAL STATIONS AND NEITHER INSTIGATED NOR COMPELLED BY THE COMMISSION.

BEM concedes that the First Amendment was directed not to private action but to "governmental" limitations and regulations relating to speech. BEM Br. 14. Although its brief intermittently refers to the policy of WTOP not to air editorial advertisements as that of "the Government and its licensees" (*id.* 17) and states that the crucial question here is whether "the government" can engage in a process of "authoritative selection" (*id.* 26), the Commission's opinion in this case and the varying practices of individual stations respecting editorial advertising demonstrate that the challenged policy has not been required or mandated by the Commission but is entirely based on WTOP's journalistic judgment. See

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compromise set forth by the Commission expressed the licensee's intention to cover public issues "primarily on a sustaining basis." *Id.* at 517.

WTOP Br. 52-53. BEM implicitly recognizes this fact in an extensive argument attempting to show that the action of WTOP constitutes state action. BEM Br. 69-82.

Although BEM disclaims reliance on "magic formula" for determining when seemingly private entities are engaged in state action (BEM Br. 70), it invokes three such formula by alleging that state action exists here because broadcasters are licensed and regulated, because the Commission "approved" WTOP's policy, and because of the "importance" of broadcasting as a medium. These arguments and the principal relevant authorities are discussed in WTOP's opening brief (pp. 52-62). It is thus necessary only to comment briefly upon BEM's argument and to consider two major state action decisions of this Court handed down late last Term after WTOP's opening brief had been prepared.

BEM argues that licensing and regulation by the state convert decisions of the private entity so licensed or regulated into state action. BEM's brief (p. 70) appears to derive this asserted test principally from *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), which did not adopt it.[21] Two other decisions BEM cites

[21] In *Burton*, the Court held unlawful racial discrimination practiced by a restauranteur who leased his location from the state within the confines of a large municipal parking garage operated by the state. The Court did not lay down any general rule relating to licensing and regulation as bases for a state action finding and, indeed, warned that "the conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested." 365 U.S. at 725. The Court found that because of the physical location of the restaurant inside a state facility, the financial support afforded by the state in constructing the restaurant and other relevant factors, the state had placed "its power, property and prestige behind the admitted discrimination." *Id.* at 724-25.

for the same proposition (BEM Br. 70-71)—the *Moose Lodge* and *Lloyd* cases discussed below—actually rejected state action arguments and the former contains language directly contrary to the "licensing and regulation" formula for state action advanced by BEM. See pp. 23-24, *infra*. The argument made by BEM would extend and dilute the state action concept to apply it to almost every decision of government licensed businesses, individuals licensed in one of the professions, tax-exempt foundations and a host of other entities licensed and regulated by the state. It is significant that BEM makes little attempt to distinguish such cases.

The further argument that the Commission has specifically "approved" the policy of WTOP here involved is based on a misconception of the facts. The Commission did not prompt WTOP's policy, has not required it, and has explicitly emphasized that stations following contrary policies are free to do so. There is no merit to BEM's bootstrap argument that approval should be inferred because, at BEM's own request, the Commission investigated BEM's fairness complaint and its other allegations and determined that they provided no basis for Commission intervention. BEM Br. 79-81. If the question of Commission "approval" is decisive, it must be tested by what the Commission has actually said and not by the Alice-in-Wonderland notion that the Commission has encouraged or required everything it has not affirmatively forbidden.

BEM's final formula rests on the puzzling proposition that state action is involved simply because radio is an important medium of communication. See BEM Br. 81-82. There is no apparent relationship between the importance of the medium and the presence or absence of state action, and BEM's argument simply invites

analytic confusion. It compounds that confusion by addressing the argument to the importance of "the broadcast medium" as if it were abstract monolith (BEM Br. 81-82). In fact, what is at issue here is a particular policy followed by some stations and rejected by others.

Two decisions of this Court in June 1972 deserve special consideration because they represent the latest exposition and analysis of the state action concept. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), and *Lloyd Corp. v. Tanner*, 40 U.S.L. Wk. 4829 (June 22, 1972). BEM seeks to distinguish both decisions which held that state action was not present. There are necessarily factual differences between those cases and the present one including differences that are unfavorable to BEM, such as the presence of racial discrimination in *Moose Lodge* and the physical integration of the shopping center in *Lloyd* with surrounding public property. These decisions are pertinent here, however, not because of precise factual analogies but because of what this Court said in them about the general principles of state action and its own prior decisions.

In *Moose Lodge*, the Court made clear that a regulatory relationship between the state and the entity sought to be pinned with the state action label is not enough, even if the regulation as such may be very substantial.[22] The

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[22] In that case, this Court noted without disagreement the trial court's finding that there was "pervasive" regulation of such private clubs by the Pennsylvania Liquor Control Board. Among other examples, it was noted that such clubs must be licensed, must make physical alterations at the agency's request, must file lists of names and addresses of members and employees, must maintain extensive financial records, and must make club premises available for agency inspection. See 407 U.S. at 176.

Court noted that a test based on the existence of a regulatory relationship in the abstract "would utterly emasculate the distinction between private as distinguished from State conduct" followed for over a century. 407 U.S. at 173. It reaffirmed, as *Burton* itself indicates, that that decision was never intended to make licensing or regulation as such the touchstone of state action. *Id.*

The Court directed attention instead to the question whether the state intervention or regulation required, fostered, or instigated the *particular* conduct challenged as impermissible under the Constitution. 407 U.S. at 176-77. The opinion made plain that it is not state regulation considered at large that is decisive but whether the state has "significantly involved itself with invidious discriminations." *Id.* at 173 (quoting *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967)). Thus, what is significant is the fact that however closely the FCC may regulate transmitter power, personal attacks, or other aspects of broadcasting not here involved, it does not purport to dictate or govern a station's policy on the sale of time for editorial advertising. The Commission has made clear that that question is left to each station to decide for itself.

The other recent decision of this Court—the *Lloyd* case—shows that the lower court erred in its contention that a broadcast station's action is state action because of "the importance and suitability of that enterprise for the communication of ideas" (A. 459, 463-64). *Lloyd* shows that the presence of an audience and the feasibility of communicating are not themselves characteristics that convert an enterprise into a public forum subject to the same First Amendment constraints that apply to the state itself. At the same time the Court explicitly limited its earlier decision in *Amalgamated Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), a decision

on which the court below in this case heavily relied (A. 463-64).

Finally, BEM has not and cannot explain how, if WTOP's present course comprises state action, the courts can avoid plenary constitutional review of every broadcaster determination to accept or reject a particular editorial advertisement. Indeed, decisions by broadcasters on any other facet of editorial or administrative operation would apparently be equally subject to challenge on First Amendment, equal protection, or due process grounds. While stating generally that litigation of constitutional issues is to be "welcomed" (BEM Br. 60), BEM does assert that litigation in the courts over particular determinations whether to accept or reject editorial advertisements would involve only "a garden variety review of administrative action . . . ." *Id.* 55 & n.76. Having once summoned the genie out of the bottle, the cork cannot be so readily replaced; BEM's brief gives no reason why the "abridgeable" First Amendment right it relies on here will not be equally available to those who follow.

BEM's own brief foreshadows what its position would actually be when and if a new "abridgeable" constitutional right is established and broadcasters throughout the country are faced with the task of determining whether particular advertisements should be aired. Thus, BEM asserts that it is "anathema to First Amendment interests" for broadcasters to assert an interest in "keeping frivolous, unimportant, or crackpot speeches off the air." BEM Br. 54 n.75. It apparently conceives as "censorship" any broadcaster determination that material is misleading, scandalous or indecent. *Id.* 23. It disparages any station policy or desire not to transmit what is "unduly inflammatory, offensive or otherwise unsuitable

for broadcasting into the home." *Id.* These assertions undercut BEM's more general statements that its new regime would permit ample broadcaster and agency flexibility (*e.g.*, BEM Br. 55 & n. 76, 60-61) and show that the First Amendment would be summoned forth at every turn.

Once there were established a constitutional "right" to require carriage of editorial advertisements, the agency's task of oversight would be vastly complicated by the necessity of applying fixed constitutional doctrines derived in situations remote from the regulated area. The courts would also be implicated to an extent never before necessary, for there would be no dearth of litigants to urge that "courts—and not administrative agencies—are the appropriate arbiters of constitutional disputes" (DNC Br. in Opp. 19). Even Congress would be constrained in altering the regime if it were premised on a state-action determination that applies the requirements of the First Amendment.

If the lower court's state action ruling is upheld, ultimately this Court will have to decide what is and is not permissible in the field of broadcast editorial advertising on a case-by-case basis. This responsibility will extend to considering specific advertisements—whose range and variety are potentially unlimited—no less than the standards, exceptions and procedures broadcasters attempt to devise to cope with the problems in the first instance.[23] Given the demands on this Court's time and attention and the existence of an elaborate statutory regime for broadcasting, it is difficult to conceive of any endeavor less necessary and less appropriate than the

[23] See, *e.g.*, *Niemotko* v. *Maryland*, 340 U.S. 268, 271 (1951); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964).

super-agency role that BEM's argument would assign to this Court.

CONCLUSION

For the reasons stated the decision below should be reversed.

Respectfully submitted,

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

COLUMBIA BROADCASTING SYSTEM, INC. *v.* DEMOCRATIC NATIONAL COMMITTEE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-863. Argued October 16, 1972—Decided May 29, 1973*

The Democratic National Committee requested a declaratory ruling from the Federal Communications Commission (FCC) that the Communications Act or the First Amendment precluded a licensee from having a general policy of refusing to sell time to "responsible entities" to present their views on public issues. The Business Executives' Move for Vietnam Peace filed a complaint with the FCC, alleging that a broadcaster had violated the First Amendment by refusing to sell it time to broadcast spot announcements expressing the group's views on the Vietnam conflict and that the station's coverage of antiwar views did not meet the requirements of the Fairness Doctrine. The FCC rejected the Fairness Doctrine challenge and ruled that a broadcaster was not prohibited from having a policy of refusing to accept paid editorial advertisements by individuals and organizations like respondents. The Court of Appeals reversed, holding that "a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted," and remanded the causes to the FCC to develop regulations governing which, and how many, editorial announcements would be aired. *Held:* Neither the Communications Act nor the First Amendment requires broadcasters to accept paid editorial advertisements. Pp. ———.

450 F. 2d 642, reversed.

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*Together with Nos. 71-864, *Federal Communications Commission et al.* v. *Business Executives' Move for Vietnam Peace et al.*; 71-865, *Post-Newsweek Stations, Capital Area, Inc.* v. *Business Executives' Move for Vietnam Peace*; and 71-866, *American Broadcasting Companies, Inc.* v. *Democratic National Committee*, also on certiorari to the same court.

Syllabus

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court with respect to Parts I, II, and IV, finding that:

1. The basic criterion governing use of broadcast frequencies is the right of the public to be informed; the manner by which this interest is best served is dispositive of the respondents' statutory and First Amendment contentions. Pp. 5–19.

(a) In evaluating respondents' claims, great weight must be afforded the decisions of Congress and the experience of the FCC. Pp. 5–8.

(b) Congress has consistently rejected efforts to impose on broadcasters a "common carrier" right of access for all persons wishing to speak out on public issues. Instead, it reposed in the FCC regulatory authority by which the Fairness Doctrine was evolved to require that the broadcaster's coverage of important public issues must be adequate and must fairly reflect differing viewpoints; thus, no private individual or group has a right to command the use of broadcast facilities. Pp. 8–19.

2. The "public interest" standard of the Communications Act, which incorporates First Amendment principles, does not require broadcasters to accept editorial advertisements. Pp. 26–34.

(a) The FCC was justified in concluding that the public interest in having access to the marketplace of "ideas and experiences" would not be served by ordering a right of access to advertising time. There is substantial risk that such a system would be monopolized by those who could and would pay the costs, that the effective operation of the Fairness Doctrine itself would be undermined, and that the public accountability which now rests with the broadcaster would be diluted. Pp. 26–30.

(b) The difficult problems involved in implementing an absolute right of access would inevitably implicate the FCC in a case-by-case determination of who should be heard and when, thus enlarging the involvement of the Government in broadcasting operations. The FCC could properly take into account the fact that listeners and viewers constitute a kind of "captive audience" and that the public interest requires that a substantial degree of journalistic discretion must remain with broadcasters. Pp. 30–34.

THE CHIEF JUSTICE, joined by MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST, concluded, in Part III, that a broadcast licensee's refusal to accept a paid editorial advertisement does not constitute "governmental action" for First Amendment purposes. The Government is neither a "partner" to the action complained

of nor engaged in a "symbiotic relationship" with the licensee. Pp. 19–26.

(a) Under the Communications Act a broadcast licensee is vested with substantial journalistic discretion in deciding how to meet its statutory obligations as a "public trustee." Pp. 19–22.

(b) The licensee's policy against accepting editorial advertising is compatible with the Communications Act and with the broadcaster's obligation to provide a balanced treatment of controversial questions. Pp. 22–26.

(c) The FCC has not fostered the licensee policy against accepting editorial advertisements; it has merely declined to command acceptance because the subject was a matter within the area of journalistic discretion. P. 23.

BURGER, C. J., announced the Court's judgment and delivered an opinion of the Court with respect to Parts I, II, and IV, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined, and in which as to Parts I, II, and III STEWART and REHNQUIST, JJ., joined. STEWART, J., filed an opinion concurring in parts I, II, and III. WHITE, J., filed an opinion concurring in Parts I, II, and IV. BLACKMUN, J., filed an opinion concurring in Parts I, II, and IV, in which POWELL, J., joined. DOUGLAS, J., filed a separate opinion concurring in the judgment. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 71–863, 71–864, 71–865, AND 71–866

Columbia Broadcasting System, Inc., Petitioner,
71–863 *v.*
Democratic National Committee.

Federal Communications Commission et al., Petitioners,
71–864 *v.*
Business Executives' Move for Vietnam Peace et al.

Post-Newsweek Stations, Capital Area, Inc., Petitioner,
71–865 *v.*
Business Executives' Move for Vietnam Peace.

American Broadcasting Companies, Inc., Petitioner,
71–866 *v.*
Democratic National Committee.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court (Parts I, II, and IV) together with an opinion (Part III) in which MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST joined.

We granted the writs in these cases to consider whether a broadcast licensee's general policy of not selling adver-

tising time to individuals or groups wishing to speak out on issues they consider important violates the Federal Communications Act of 1934, 47 U. S. C. §151 *et seq.*, or the First Amendment.

In two orders announced the same day, the Federal Communications Commission ruled that a broadcaster who meets his public obligation to provide full and fair coverage of public issues is not required to accept editorial advertisements. *In re Democratic National Committee*, 25 F. C. C. 216; *In re Business Executives Move for Vietnam Peace*, 25 F. C. C. 2d 242. A divided Court of Appeals reversed the Commission, holding that a broadcaster's fixed policy of refusing editorial advertisements violates the First Amendment; the court remanded the cases to the Commission to develop procedures and guidelines for administering a First Amendment right of access. *Business Executives' Move For Vietnam Peace* v. *FCC*, 146 U. S. App. D. C. 181, 450 F. 2d 642 (1971).

The complainants in these actions are the Democratic National Committee (DNC) and the Business Executives' Move for Vietnam Peace (BEM), a national organization of businessmen opposed to United States involvement in the Vietnam conflict. In January 1970, BEM filed a complaint with the Commission charging that radio station WTOP in Washington, D. C., had refused to sell it time to broadcast a series of one-minute spot announcements expressing BEM views on Vietnam. WTOP, in common with many but not all broadcasters, followed a policy of refusing to sell time for spot announcements to individuals and groups who wished to expound their views on controversial issues. WTOP took the position that since it presented full and fair coverage of important public questions, including the Vietnam conflict, it was justified in refusing to accept editorial advertisements. WTOP also submitted evidence showing that the station had aired the views of

critics of our Vietnam policy on numerous occasions. BEM challenged the fairness of WTOP's coverage of criticism of that policy, but it presented no evidence in support of that claim.

Four months later, in May 1970, the DNC filed with the Commission a request for a declaratory ruling:

> "That under the First Amendment to the Constitution and the Communications Act, a broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues."

DNC claimed that it intended to purchase time from radio and television stations and from the national networks in order to present the views of the Democratic Party and to solicit funds. Unlike BEM, DNC did not object to the policies of any particular broadcaster but claimed that its prior "experiences in this area make it clear that it will encounter considerable difficulty—if not total frustration of its efforts—in carrying out its plans in the event the Commission should decline to issue a ruling as requested." DNC cited *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969), as establishing a limited constitutional right of access to the airwaves.

In two separate opinions, the Commission rejected respondents' claim that "responsible" individuals and groups have a right to purchase advertising time to comment on public issues without regard to whether the broadcaster has complied with the Fairness Doctrine. The Commission viewed the issue as one of major significance in administering the regulatory scheme relating to the electronic media, one going "to the heart of the system of broadcasting which has developed in this country. . . ." 25 F. C. C. 2d, at 221. After reviewing the legislative history of the Communications Act, the provisions of the Act itself, the Commission's decisions under

the Act and the difficult problems inherent in administering a right of access, the Commission rejected the demands of BEM and DNC.

The Commission also rejected BEM's claim that WTOP had violated the Fairness Doctrine by failing to air views such as those held by members of BEM; the Commission pointed out that BEM had made only a "general allegation" of unfairness in WTOP's coverage of the Vietnam conflict and that the station had adequately rebutted the charge by affidavit. The Commission did, however, uphold DNC's position that the statute recognized a right of political parties to purchase broadcast time for the purpose of soliciting funds. The Commission noted that Congress has accorded special consideration for access by political parties, see 47 U. S. C. § 315 (a), and that solicitation of funds by political parties is both feasible and appropriate in the short space of time generally allotted to spot advertisements.[1]

A majority of the Court of Appeals reversed the Commission, holding that "a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted." 450 F. 2d, at 646. Recognizing that the broadcast frequencies are a scarce resource inherently unavailable to all, the court nevertheless concluded that the First Amendment mandated an "abridgeable" right to present editorial advertisements. The court reasoned that a broadcaster's policy of airing commercial advertisements but not editorial advertisements constitutes unconstitutional discrimination. The court did not, how-

[1] The Commission's rulings against BEM's Fairness Doctrine complaint and in favor of DNC's claim that political parties should be permitted to purchase airtime for solicitation of funds were not appealed to the Court of Appeals and are not before us here.

ever, order that either BEM's or DNC's proposed announcements must be accepted by the broadcasters; rather, it remanded the cases to the Commission to develop "reasonable procedures and regulations determining which and how many 'editorial announcements' will be put on the air." *Ibid.*

Judge McGowan dissented; in his view, the First Amendment did not compel the Commission to undertake the task assigned to it by the majority:

> "It is presently the obligation of a licensee to advance the public's right to know by devoting a substantial amount of time to the presentation of controversial views on issues of public importance, striking a balance which is always subject to redress by reference to the fairness doctrine. Failure to do so puts continuation of the license at risk—a sanction of tremendous potency, and one which the Commission is under increasing pressure to employ.
>
> "This is the system which Congress has, wisely or not, provided as the alternative to public ownership and operation of radio and television communications facilities. This approach has never been thought to be other than within the permissible limits of constitutional choice." 450 F. 2d, at 666.

Judge McGowan concluded that the court's decision to overrule the Commission and to remand for development and implementation of a constitutional right of access put the Commission in a "constitutional strait jacket" on a highly complex and far-reaching issue.

I

MR. JUSTICE WHITE'S opinion for the Court in *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969), makes clear that the broadcast media pose unique and

special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated. The Court spoke to this reality when, in *Red Lion*, we said "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Red Lion, supra,* 395 U. S., at 388.

Because the broadcast media utilize a valuable and limited public resource, there is also present an unusual order of First Amendment values. *Red Lion* discussed at length the application of the First Amendment to the broadcast media. In analyzing the broadcasters' claim that the Fairness Doctrine and two of its component rules violated their freedom of expression, we held that "[n]o one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech.'" *Red Lion, supra,* 395 U. S., at 389. Although the broadcaster is not without protection under the First Amendment, *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166 (1948), "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." *Red Lion, supra,* 395 U. S., at 390.

Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty. The process must necessarily be

undertaken within the framework of the regulatory scheme that has evolved over the course of the past half-century. For during that time, Congress and its chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of all concerned. The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence.

Thus, in evaluating the First Amendment claims of respondents, we must afford great weight to the decisions of Congress and the experience of the Commission. Professor Chafee aptly observed:

> "Once we get away from the bare words of the [First] Amendment, we must construe it as part of a Constitution which creates a government for the purpose of performing several very important tasks. The [First] Amendment should be interpreted so as not to cripple the regular work of the government. A part of this work is the regulation of interstate and foreign commerce, and this has come in our modern age to include the job of parceling out the air among broadcasters, which Congress has entrusted to the FCC. Therefore, every free-speech problem in the radio has to be considered with reference to the satisfactory performance of this job as well as to the value of open discussion. Although free speech should weigh heavily in the scale in the event of conflict, still the Commission should be given ample scope to do its job." II Chafee, Government and Mass Communications 640–641 (1947).

The judgment of the legislative branch cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claims under the umbrella

of the First Amendment. That is not to say we "defer" to the judgment of the Congress and the Commission on a constitutional question, nor that we would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression. The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of government have addressed the same problem. Thus, before confronting the specific legal issues in these cases, we turn to an examination of the legislative and administrative development of our broadcast system over the last half century.

II

This Court has on numerous occasions recounted the origins of our modern system of broadcast regulation. See, *e. g., Red Lion, supra,* 395 U. S., at 375–386; *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 210–217 (1943); *FCC* v. *Sanders Brothers Radio Station,* 309 U. S. 470, 474 (1940); *FCC* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 137–138 (1940). We have noted that prior to the passage of the Radio Act of 1927, 44 Stat. 1162, broadcasting was marked by chaos. The unregulated and burgeoning private use of the new media in the 1920's had resulted in an intolerable situation demanding congressional action:

> "It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacaphony of competing voices, none of which could be clearly and predictably heard." *Red Lion, supra,* 395 U. S., at 376.

But, once it was accepted that broadcasting was subject to regulation, Congress was confronted with a major dilemma: how to strike a proper balance between priviate and public control. Cf. *Farmers Educational & Cooperative Union of America* v. *WDAY, Inc.*, 360 U. S. 525, 528 (1959).

One of the earliest and most frequently quoted statements of this dilemma is that of Herbert Hoover, when he was Secretary of Commerce. While his Department was making exploratory attempts to deal with the infant broadcasting industry in the early 1920's, he testified before a House Committee:

> "We cannot allow any single person or group to place themselves in [a] position where they can censor the material which shall be broadcasted to the public, nor do I believe that the government should ever be placed in the position of censoring this material." Hearings before the House Committee on the Merchant Marine and Fisheries, 68th Cong., 1st Sess. (1924).

That statement foreshadowed the "tightrope" aspects of government regulation of the broadcast media, a problem the Congress, the Commission and the courts have struggled with ever since. Congress appears to have concluded, however, that of these two choices—private or official censorship—Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided.

The legislative history of the Radio Act of 1927, the model for our present statutory scheme, see *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137 (1940), reveals that in the area of discussion of public issues Congress chose to leave broad journalistic discretion with the licensee. Congress specifically dealt with—and firmly rejected—the argument that the broadcast facilities

should be open on a nonselective basis to all persons wishing to talk about public issues. Some members of Congress—those whose views were ultimately rejected—strenuously objected to the unregulated power of broadcasters to reject applications for service. See, *e. g.*, H. R. Rep. No. 404, 69th Cong., 1st Sess., at 18 (minority report). They regarded the exercise of such power to be "private censorship," which should be controlled by treating broadcasters as public utilities.[2] The provision that came closest to imposing an unlimited right of access to broadcast time was part of the bill reported to the Senate by the Committee on Interstate Commerce. The bill that emerged from the Committee contained the following provision:

> "[I]f any licensee shall permit a broadcasting station to be used . . . by a candidate or candidates for any public office, *or for the discussion of any question affecting the public,* he shall make no discrimination as to the use of such broadcasting station, *and with respect to such matters the licensee shall be deemed a common carrier in interstate commerce:* Provided, that such licensee shall have no power to censor the material broadcast." 67 Cong. Rec. (1926) (emphasis added).

When the bill came to the Senate floor, the principal architect of the Radio Act of 1927 and the Chairman of the Commerce Committee, Senator Dill, offered an amendment to the provision to eliminate the common

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[2] Congressman Davis, for example, stated on the floor of the House the view that Congress found unacceptable:

"I do not think any member of the committee will deny that it is absolutely inevitable that we are going to have to regulate the radio public utilities just as we regulate other public utilities. We are going to have to regulate the rates and the service, and to force them to give equal service and equal treatment to all." 67 Cong. Rec. 5483. See also 67 Cong. Rec. 5484.

carrier obligation and to restrict the right of access to candidates for public office. Senator Dill explained the need for the amendment:

> "When we recall that broadcasting today is purely voluntary, and the listener-in pays nothing for it, that the broadcaster gives it for the purpose of building up his reputation, it seemed unwise to put the broadcaster under the hampering control of being a common carrier and compelled to accept anything and everything that was offered him so long as the price was paid." *Ibid.*

The Senators were also sensitive to the problems involved in legislating "equal opportunities" with respect to the discussion of public issues. Senator Dill stated:

> "["Public questions"] is such a general term that there is probably no question of any interest whatsoever that be discussed but that the other side of it could demand time; and thus a radio station would be placed in the position that the Senator from Iowa mentions about candidates, namely, that they would have to give all their time to that kind of discussion, or no public question could be discussed." 67 Cong. Rec. 12504.

The Senate adopted Senator Dill's amendment. The provision finally enacted, § 18 of the Radio Act of 1927, 44 Stat. 1170, was later re-enacted as § 315 (a) of the Communications Act of 1934,[3] but only after Congress

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[3] Section 315 (a) now reads:

"If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station; *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station

rejected another proposal that would have imposed a limited obligation on broadcasters to turn over their microphones to persons wishing to speak out on certain public issues.[4] Instead, Congress after prolonged con-

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by any such candidate. Appearance by a legally qualified candidate on any—

"(1) bona fide newscast,

"(2) bona fide news interview,

"(3) bona fide news documentary [if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary], or

"(4) on-the-spot coverage of bona fide news events [including but not limited to political conventions and activities incidental thereto],

"shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcaster, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news event, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U. S. C. § 315 (a).

[4] The Senate passed a provision providing that:

". . . if any licensee shall permit any person to use a broadcasting station in support of or in opposition to any candidate for public office, *or in the presentation of views on a public question to be voted upon at an election, he shall afford equal opportunity to an equal number of other persons to use such station* in support of an opposing candidate for such public office, or to reply to a person who has used such broadcasting station in support of or in opposition to a candidate, *or for the presentation of opposite views on such public questions.*"

See Hearings before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess., on S. 2910, at 19 (1934) (emphasis added). The provision for discussion of public issues was deleted by the House-Senate Conference. See H. R. Rep. No. 1918 on S. 3285, 73d Cong., 2d Sess., at 49.

Also noteworthy are two bills offered in 1934 that would have restricted the control of broadcasters over the discussion of certain

sideration adopted § 3 (h), which specifically provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." [5]

Other provisions of the 1934 Act also evince a legislative desire to preserve values of private journalism

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issues. Congressman McFadden proposed a bill that would have forbidden broadcasters from discriminating against programs sponsored by religious, charitable, or educational associations. H. R. 7986, 73d Cong., 2d Sess. (1934). The bill was not reported out of committee. And, during the debates on the 1934 Act, Senators Wagner and Hatfield offered an amendment that would have ordered the Commission to "reserve and allocate only to educational, religious, agricultural, labor, cooperative, and similar non-profit-making associations one-fourth of all the radio broadcasting facilities within its jurisdiction." 78 Cong. Rec. 8828. Senator Dill explained why the Committee had rejected the proposed amendment, indicating that the practical difficulties and the dangers of censorship were crucial:

"MR. DILL. . . . If we should provide that 25 percent of time shall be allocated to nonprofit organizations, someone would have to determine—Congress or somebody else—how much of the 25 percent should go to education, how much of it to labor, how much of it to fraternal organizations, and so forth. When we enter this field we must determine how much to give to the Catholics probably and how much to the Protestants and how much to the Jews." 78 Cong. Rec. 8843.

Senator Dill went on to say that the problem of determining the proper allocation of time for discussion of these subjects should be worked out by the Commission. 78 Cong. Rec. 8844. The Senate rejected the amendment. 78 Cong. Rec. 8846.

[5] Section 3 (h) provides as follows:

"'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 48 Stat. 1065, as amended, 47 U. S. C. § 153 (h).

under a regulatory scheme which would insure fulfillment of certain public obligations. Although the Commission was given the authority to issue renewable three-year licenses to broadcasters[6] and to promulgate rules and regulations governing the use of those licenses,[7] both consistent with the "public interest, convenience and necessity," § 326 of the Act specifically provides that:

> "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U. S. C. § 326.

From these provisions it seems clear that Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations. Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the Act. License renewal pro-

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[6] 48 Stat. 1083, as amended, 47 U. S. C. § 307.

[7] Section 303 of the Communications Act of 1934, 48 Stat. 1082, as amended, 47 U. S. C. § 303, provides in relevant part:

"Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest or necessity requires, shall—

. . . . . .

"(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

. . . . . .

"(4) make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter. . . ."

ceedings, in which the listening public can be heard, are a principal means of such regulation. See *Office of Communications of the United Church of Christ* v. *FCC*, 123 U. S. App. D. C. 328, 359 F. 2d 994 (1966), and 138 U. S. App. D. C. 112, 425 F. 2d 543 (1969).

Subsequent developments in broadcast regulation illustrate how this regulatory scheme has evolved. Of particular importance, in light of Congress' flat refusal to impose a "common carrier" right of access for all persons wishing to speak out on public issues, is the Commission's "Fairness Doctrine," which evolved gradually over the years spanning federal regulation of the broadcast media.[8] Formulated under the Commission's power to issue regulations consistent with the "public interest," the doctrine imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints. See *Red Lion, supra*, 395 U. S., at 377. In fulfilling its Fairness Doctrine obligations, the broadcaster must provide free time for the presentation of opposing views if a paid sponsor is unavailable, *Cullman Broadcasting Co.*, 25 P & F Radio Reg. 895 (1963), and it must initiate programming on public issues if no one else seeks to do so. See *John J. Dempsey*, 6 P & F Radio Reg. 615 (1950); *Red Lion, supra*, 395 U. S., at 378.

Since it is physically impossible to provide time for all viewpoints, however, the right to exercise editorial judgment was granted to the broadcaster. The broadcaster, therefore, is allowed significant journalistic discretion in deciding how best to fulfill its Fairness Doctrine

[8] In 1959, Congress amended § 315 of the Act to give statutory approval to the Fairness Doctrine. Act of September 14, 1959, § 1, 73 Stat. 557, as amended, 47 U. S. C. § 315 (a).

For a summary of the development and nature of the Fairness Doctrine, see *Red Lion, supra*, 395 U. S., at 375–386.

obligations,[9] although that discretion is bounded by rules designed to assure that the public interest in fairness is furthered. In its decision in the instant cases, the Commission described the boundaries as follows:

> "The most important consideration in this respect is that the licensee cannot rule off the air coverage of important issues or views because of his private ends or beliefs. As a public trustee, he must present representative community views and voices on controversial issues which are of importance to his listeners. . . . This means also that some of the voices must be partisan. A licensee policy of excluding partisan voices and always itself presenting views in a bland, unoffensive manner would run counter to the 'profound national commitment that debate on public issues should be uninhibited, robust, and wide open.' *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964); see also *Red Lion Broadcasting Co., Inc.* v. *F. C. C.*, 395 U. S. 367, 392 (n. 18) (1969). . . ." 25 F. C. C. 2d, at 222–223.

Thus, under the Fairness Doctrine broadcasters are responsible for providing the listening and viewing public with access to a balanced presentation of information

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[9] See *Madalyn Murray*, 5 P & F Radio Reg. 2d 263 (1965). Factors that the broadcaster must take into account in exercising his discretion include the following:

"In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person [or group] making the request." Report on Editorializing by Broadcast Licensees, 13 F. C. C. 1246 (1949).

on issues of public importance.[10] The basic principle underlying that responsibility is "the right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter. . . ." *Report on Editorializing*, 13 F. C. C. 1246, 1249 (1949). Consistent with that philosophy, the Commission on several occasions has ruled that no private individual or group has a right to command the use of broadcast facilities.[11] See, *e. g.*, *Dowie A.*

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[10] The Commission has also adopted various component regulations under the Fairness Doctrine, the most notable of which are the "personal attack" and "political editorializing" rules which we upheld in *Red Lion*. The "personal attack" rule provides that "when, during the presentation of views on a controversial issue of public importance, an attack is made on the honesty, character, integrity, or like personal qualities of an identified person," the licensee must notify the person attacked and give him an opportunity to respond. *E. g.*, 47 CFR § 73.123. Similarly, the "political editorializing" rule provides that, when a licensee endorses a political candidate in an editorial, he must give other candidates or their spokesmen an opportunity to respond. *E. g.*, 47 CFR § 73.123.

The Commission, of course, has taken other steps beyond the Fairness Doctrine to expand the diversity of expression on radio and television. The chain broadcasting and multiple ownership rules are established examples. *E. g.*, 47 CFR §§ 73.131, 73.240. More recently, the Commission promulgated rules limiting television network syndication practices and reserving 25% of prime time for non-network programs. 47 CFR §§ 73.658 (j), (k).

[11] The Court of Appeals, respondents, and the dissent in this case have relied on *dictum* in *United Broadcasting Co.*, 10 F. C. C. 515 (1945), as illustrating Commission approval of a private right to purchase air time for the discussion of controversial issues. In that case the complaint alleged not only that the station had a policy of refusing to sell time for the discussion of public issues, but also that the station had applied its policy in a discriminatory manner, a factor not shown in the cases presently before us. Furthermore, the decision was handed down four years before the Commission had fully de-

Crettenden, 18 F. C. C. 2d 499 (1969); *Mrs. Margaret Z. Scherbina*, 21 F. C. C. 2d 141 (1969); *Boalt Hall Student Assn.*, 20 F. C. C. 2d 612 (1969); *Mrs. Madalyn Murray*, 40 F. C. C. 647 (1965); *Democratic State Central Committee of California*, 19 F. C. C. 2d 833 (1968); *U. S. Broadcasting Co.*, 2 F. C. C. 208 (1935). Congress has not yet seen fit to alter that policy, although since 1934 it has amended the Act on several occasions [12] and considered various proposals that would have vested private individuals with a right of access.[13]

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veloped and articulated the Fairness Doctrine. See Report on Editorializing by Broadcast Licensees, 13 F. C. C. 1246 (1949). Thus, even if the decision is read without reference to the allegation of discrimination, it stands as merely an isolated statement, made during the period in which the Commission was still working out the problems associated with the discussion of public issues; the *dictum* has not been followed since and has been modified by the Fairness Doctrine.

[12] In 1959, for example, Congress amended § 315 (a) of the Act to give statutory approval to the Commission's Fairness Doctrine. Act of September 14, 1959, § 1, 73 Stat. 557, amending 47 U. S. C. § 315 (a). Very recently, Congress amended § 312 (a) of the 1934 Act to authorize the Commission to revoke a station license "for willful or repeated failure to allow reasonable access to or permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for federal elective office on behalf of his candidacy." Campaign Communications Reform Act of 1972, Pub. L. No. 92-225. This amendment essentially codified the Commission's prior interpretation of § 315 (a) as requiring broadcasters to make time available to political candidates. *Farmers Union* v. *WDAY*, 360 U. S. 525, 534 (1959). See FCC Memorandum on Second Sentence of Section 315 (a), in Political Broadcasts—Equal Time, Hearings before Subcommittee of the House Interstate and Foreign Commerce Commission, 88th Cong., 1st Sess., on H. J. Res. 247, pp. 84–90.

[13] See, *e. g.*, H. R. 3595, 80th Cong., 1st Sess. (1947). A more recent proposal was offered by Senator Fulbright. His bill would have amended § 315 of the Act to provide:

"(d) Licensees shall provide a reasonable amount of public service time to authorized representatives of the Senate of the United States,

With this background in mind, we next proceed to consider whether a broadcaster's refusal to accept editorial advertisements is governmental action violative of the First Amendment.

III

That "Congress shall make no law . . . abridging the freedom of speech, or of the press" is a restraint on government action, not that of private persons. *Public Utility Commission* v. *Pollak*, 343 U. S. 451, 461 (1952). The Court has not previously considered whether the action of a broadcast licensee such as that challenged here is "governmental action" for purposes of the First Amendment. The holding under review thus presents a novel question, and one with far-reaching implications. See L. Jaffe, The Editorial Responsibility of the Broadcaster, 85 Harv. L. Rev. 768, 782–787 (1972).

The Court of Appeals held that broadcasters are instrumentalities of the government for First Amendment purposes, relying on the thesis, familiar in other contexts, that broadcast licensees are granted use of part of the public domain and are regulated as "proxies" or "fiduciaries of the people." 450 F. 2d, at 652. These characterizations are not without validity for some purposes, but they do not resolve the sensitive constitutional issues inherent in deciding whether a particular licensee action is subject to First Amendment restraints.[14]

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and the House of Representatives of the United States, to present the views of the Senate and the House of Representatives on issues of public importance. The public service time required to be provided under this subsection shall be made available to each such authorized representative at least, but not limited to, four times during each calendar year." S. J. Res. 209, 91st Cong., 2d Sess. (1970).

[14] The dissent offers the same analysis as the Court of Appeals. As one distinguished commentator has recognized, this line of reasoning "stretch[es] the concept of state action very far." Jaffe,

In dealing with the broadcast media, as in other contexts, the line between private conduct and governmental action cannot be defined by reference to any general formula unrelated to particular exercises of governmental authority. When governmental action is alleged there must be cautious analysis of the quality and degree of government relationship to the particular acts in question. "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1961).

In deciding whether the First Amendment encompasses the conduct challenged here, it must be kept in mind that we are dealing with a vital part of our system of communication. The electronic media have swiftly become a major factor in the dissemination of ideas and information. More than 7,000 licensed broadcast stations undertake to perform this important function. To a large extent they share with the printed media the role of keeping people informed.

As we have seen, with the advent of radio a half century ago Congress was faced with a fundamental choice between total government ownership and control of the new medium—the choice of most other countries—or some other alternative. Long before the impact and potential of the medium was realized, Congress opted for a system of private broadcasters licensed and regulated by Government. The legislative history suggests that this choice was influenced not only by traditional attitudes toward private enterprise, but by a desire to main-

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The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768, 784 (1972). The notion that broadcasters are engaged in "governmental action" because they are licensed to utilize the "public" frequencies and because they are regulated is superficially appealing but, as Professor Jaffe observes, "not entirely satisfactory." *Id.*, at 783.

tain for licensees, so far as consistent with necessary regulation, a traditional journalistic role. The historic aversion to censorship led Congress to enact § 326 of the Act, which explicitly prohibits the Commission from interfering with the exercise of free speech over the broadcast frequencies. Congress pointedly refrained from divesting broadcasters of their control over the selection of voices; § 3 (h) of the Act stands as firm congressional statement that broadcast licensees are not to be treated as common carriers, obliged to accept whatever is tendered by members of the public. Both these provisions clearly manifest the intention of Congress to maintain a substantial measure of journalistic independence for the broadcast licensee.[15]

The regulatory scheme evolved slowly, but very early the licensee's role developed in terms of a "public trustee" charged with the duty of fairly and impartially informing the listening and viewing public. In this structure the Commission acts in essence as an "overseer," but the initial and primary responsibility for fairness, balance and objectivity rests with the licensee. This role of the Government as an "overseer" and ultimate arbiter and guardian of the public interest and the role

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[15] The dissenting view would appear to "want to have it both ways" on the question of government control of the broadcast media. In finding governmental action, the dissent stresses what is perceived as an "elaborate statutory scheme governing virtually all aspects of the broadcast industry." "Indeed," the dissent suggests, "federal agency review and guidance of broadcaster conduct is automatic, continuing and pervasive." *Infra*, at —. Yet later in the dissent, when discussing the constitutional need for a right of access, the dissent objects to the substantial independence afforded broadcasters in covering issues of public importance. Thus, it is said that "broadcasters retain almost exclusive control over the selection of issues and viewpoints to be covered, the manner of presentation and, perhaps most important, who shall speak." *Infra*, at —.

of the licensee as a journalistic "free agent" call for a delicate balancing of competing interests. The maintenance of this balance for more than 40 years has called on both the regulators and the licensees to walk a "tightrope" to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act.

The tensions inherent in such a regulatory structure emerge more clearly when we compare a private newspaper with a broadcast licensee. The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers. A broadcast licensee has a large measure of journalistic freedom but not as large as that exercised by a newspaper. A licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a "public trustee." To perform its statutory duties, the Commission must oversee without censoring. This suggests something of the difficulty and delicacy of administering the Communications Act—a function calling for flexibility and the capacity to adjust and readjust the regulatory mechanism to meet changing problems and needs.

The licensee policy challenged in this case is intimately related to the journalistic role of a licensee for which it has been given initial and primary responsibility by Congress. The licensee's policy against accepting editorial advertising cannot be examined as an abstract proposition, but must be viewed in the context of its journalistic role. It does not help to press on us the idea that editorial ads are "like" commercial ads for the licensee's policy against editorial spot ads is expressly

based on a journalistic judgment that 10 to 60 second spot announcements are ill suited to intelligible and intelligent treatment of public issues; the broadcaster has chosen to provide a balanced treatment of controversial questions in a more comprehensive form. Obviously the licensee's evaluation is based on its own journalistic judgment of priorities and newsworthiness.

Moreover, the Commission has not fostered the licensee policy challenged here; it has simply declined to command particular action because it fell within the area of journalistic discretion. The Commission explicitly emphasized that "there is of course no Commission policy thwarting the sale of time to comment on public issues." 25 F. C. C. 2d, at 226. The Commission's reasoning, consistent with nearly 40 years of precedent, is that so long as a licensee meets its "public trustee" obligation to provide balanced coverage of issues and events, it has broad discretion to decide how that obligation will be met. We do not reach the question whether the First Amendment or the Act can be read to preclude the Commission from determining that in some situations the public interest requires licensees to re-examine their policies with respect to editorial advertisements. The Commission has not yet made such a determination; it has, for the present at least, found the policy to be within the sphere of journalistic discretion which Congress has left with the licensee.

Thus, it cannot be said that the government is a "partner" to the action of broadcast licensee complained of here, nor is it engaged in a "symbiotic relationship" with the licensee, profiting from the invidious discrimination of its proxy. Compare *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 174–177 (1972), with *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 723–724 (1961). The First Amendment does not reach acts of

private parties in every instance where the Congress or the Commission has merely permitted or failed to prohibit such acts.

Our conclusion is not altered merely because the Commission rejected the claims of BEM and DNC and concluded that the challenged licensee policy is not inconsistent with the public interest. It is true that in *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451 (1952), we found governmental action sufficient to trigger First Amendment protections on a record involving agency approval of the conduct of a public utility. Though we held that the decision of a District of Columbia bus company to install radio receivers in its public buses was within the reach of the First Amendment, there Congress had expressly authorized the agency to undertake plenary intervention into the affairs of the carrier and it was pursuant to that authorization that the agency investigated the challenged policy and approved it on public interest standards. *Id.*, at 462.

Here, Congress has not established a regulatory scheme for broadcast licensees as pervasive as the regulation of public transportation in *Pollak*. More important, as we have noted, Congress has affirmatively indicated in the Communications Act that certain journalistic decisions are for the licensee, subject only to the restrictions imposed by evaluation of its overall performance under the public interest standard. In *Pollak* there was no suggestion that Congress had considered worthy of protection the carrier's interest in exercising discretion over the content of communications forced on passengers. A more basic distinction, perhaps, between *Pollak* and this case is that *Pollak* was concerned with a transportation utility that itself derives no protection from the First Amendment. See *United States* v. *Paramount Pictures, Inc.*, 344 U. S. 131, 166 (1948).

Were we to read the First Amendment to spell out governmental action in the circumstances presented here,

few licensee decisions on the content of broadcasts or the processes of editorial evaluation would escape constitutional scrutiny. In this sensitive area so sweeping a concept of governmental action would go far in practical effect to undermine nearly a half century of unmistakable congressional purpose to maintain—no matter how difficult the task—essentially private broadcast journalism held only broadly accountable to public interest standards. To do this Congress, and the Commission as its agent, must remain in a posture of flexibility to chart a workable "middle course" in its quest to preserve a balance between the essential public accountability and the desired private control of the media.

More profoundly, it would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents. To do so in the name of the First Amendment would be a contradiction. Journalistic discretion would in many ways be lost to the rigid limitations that the First Amendment imposes on government. Application of such standards to broadcast licensees would be antithetical to the very ideal of vigorous, challenging debate on issues of public interest. Every licensee is already held accountable for the totality of its performance of public interest obligations.

The concept of private, independent broadcast journalism, regulated by government to assure protection of the public interest, has evolved slowly and cautiously over more than 40 years and has been nurtured by processes of adjudication. That concept of journalistic independence could not co-exist with a reading of the challenged conduct of the licensee as governmental action. Nor could it exist without administrative flexibility to meet changing needs and the swift technological developments. We therefore conclude that the policies com-

plained of do not constitute governmental action violative of the First Amendment. See *McIntire* v. *William Penn Broadcasting Co.*, 151 F. 2d 597, 601 (CA3 1945), cert. denied, 327 U. S. 779 (1946); *Massachusetts Universalist Convention* v. *Heldreth & Rogers Co.*, 183 F. 2d 497 (CA1 1950); *Post* v. *Payton*, 323 F. Supp. 799, 803 (EDNY 1971).

IV

There remains for consideration the question whether the "public interest" standard of the Communications Act requires broadcasters to accept editorial advertisements or, whether, assuming governmental action, broadcasters are required to do so by reason of the First Amendment. In resolving those issues, we are guided by the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ." *Red Lion*, *supra*, 395 U. S., at 381. Whether there are "compelling indications" of error in this case must be answered by a careful evaluation of the Commission's reasoning in light of the policies embodied by Congress in the "public interest" standard of the Act. Many of those policies, as the legislative history makes clear, were drawn from the First Amendment itself; the "public interest" standard necessarily invites reference to First Amendment principles. Thus, the question before us is whether the various interests in free expression of the public, the broadcaster and the individuals, require broadcasters to sell commercial time to persons wishing to discuss controversial issues. In resolving that issue it must constantly be kept in mind that the interest of the public is our foremost concern. With broadcasting, where the available means of communication are limited in both space and time, the

admonition of Professor Meiklejohn that "What is essential is not that everyone shall speak, but that everything worth saying shall be said" is peculiarly appropriate. A. Meiklejohn, Political Freedom 26 (1948).

At the outset we reiterate what was made clear earlier that nothing in the language of the Communications Act or its legislative history compels a conclusion different from that reached by the Commission. As we have seen, Congress has time and again rejected various legislative attempts that would have mandated a variety of forms of individual access. That is not to say that Congress' rejection of such proposals must be taken to mean that Congress is opposed to private rights of access under all circumstances. Rather, the point is that Congress has chosen to leave such questions with the Commission, to which it has given the flexibility to experiment with new ideas as changing conditions require. In this case, the Commission has decided that on balance the undesirable effects of the right of access urged by respondents would outweigh the asserted benefits. The Court of Appeals failed to give due weight to the Commission's judgment on these matters.

The Commission was justified in concluding that the public interest in providing access to the marketplace of "ideas and experiences" would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth. Cf. *Red Lion*, *supra*, 395 U. S., at 392. Even under a first-come-first-served system, proposed by the dissenting Commissioner in these cases,[16] the views of the affluent could well prevail over those of others, since they would have it within their power to purchase time more frequently. Moreover, there is the substantial danger, as the Court of Appeals

[16] See 25 F. C. C. 2d 230, 234–235 (Johnson, dissenting).

acknowledged, 450 F. 2d, at 664, that the time allotted for editorial advertising could be monopolized by those of one political persuasion.

These problems would not necessarily be solved by applying the Fairness Doctrine, including the *Cullman* doctrine, to editorial advertising. If broadcasters were required to provide time, free when necessary, for the discussion of the various shades of opinion on the issue discussed in the advertisement, the affluent could still determine in large part the issues to be discussed. Thus, the very premise of the Court of Appeals' holding—that a right of access is necessary to allow individuals and groups the opportunity for self-initiated speech—would have little meaning to those who could not afford to purchase time in the first instance.[17]

If the Fairness Doctrine were applied to editorial advertising, there is also the substantial danger that the effective operation of that doctrine would be jeopardized. To minimize financial hardship and to comply fully with its public responsibilities a broadcaster might well be forced to make regular programming time available to those holding a view different from that expressed in an editorial advertisement; indeed, BEM has suggested as much in its brief. The result would be a further erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees who are accountable for broadcast performance to private indi-

[17] To overcome this inconsistency it has been suggested that a "submarket rate system" be established for those unable to afford the normal cost for airtime. See 85 Harv. L. Rev. 689, 695–696 (1972). That proposal has been criticized, we think justifiably, as raising "incredible administrative problems." L. Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768, 789 (1972).

viduals who are not. The public interest would no longer be "paramount" but rather subordinate to private whim especially since, under the Court of Appeals' decision, a broadcaster would be largely precluded from rejecting editorial advertisements that dealt with matters trivial or insignificant or already fairly covered by the broadcaster. 450 F. 2d, at 657, n. 36, 658. If the Fairness Doctrine and the *Cullman* doctrine were suspended to alleviate these problems, as respondents suggest might be appropriate, the question arises whether we would have abandoned more than we have gained. Under such a regime the congressional objective of balanced coverage of public issues would be seriously threatened.

Nor can we accept the Court of Appeals' view that every potential speaker is "the best judge" of what the listening public ought to hear or indeed the best judge of the merits of his or her views. All journalistic tradition and experience is to the contrary. For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is not reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression.

It was reasonable for Congress to conclude that the public interest in being informed requires periodic accountability on the part of those who are entrusted with the use of broadcast frequencies, scarce as they

are. In the delicate balancing historically followed in the regulation of broadcasting Congress and the Commission could appropriately conclude that the allocation of journalistic priorities should be concentrated in the licensee rather than diffused among many. This policy gives the public some assurance that the broadcaster will be answerable if he fails to meet their legitimate needs. No such accountability attaches to the private individual, whose only qualifications for using the broadcast facility may be abundant funds and a point of view. To agree that debate on public issues should be "robust, and wide-open" does not mean that we should exchange "public trustee" broadcasting, with all its limitations, for a system of self-appointed editorial commentators.

The Court of Appeals discounted those difficulties by stressing that it was merely mandating a "modest reform," requiring only that broadcasters be required to accept some editorial advertising. 450 F. 2d, at 663. The court suggested that broadcasters could place an "outside limit on the total amount of editorial advertising they will sell" and that the Commission and the broadcasters could develop " 'reasonable regulations' designed to prevent domination by a few groups or a few viewpoints." 450 F. 2d, at 663, 664. If the Commission decided to apply the Fairness Doctrine to editorial advertisements and as a result broadcasters suffered financial harm, the court thought the "Commission could make necessary adjustments." 450 F. 2d, at 664. Thus, without providing any specific answers to the substantial objections raised by the Commission and the broadcasters, other than to express repeatedly its "confidence" in the Commission's ability to overcome any difficulties, the court remanded the cases to the Commission for the development of regulations to implement a constitutional right of access.

By minimizing the difficult problems involved in implementing such a right of access, the Court of Appeals failed to come to grips with another problem of critical importance to broadcast regulation and the First Amendment—the risk of an enlargement of government control over the content of broadcast discussion of public issues. See, *e. g.*, *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951). This risk is inherent in the Court of Appeals remand requiring regulations and procedures to sort out requests to be heard—a process involving the very editing that licensees now perform as to regular programming. Although the use of a public resource by the broadcast media permits a limited degree of Government surveillance, as is not true with respect to private media, see *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 216–219 (1943), the Government's power over licensees, as we have noted, is by no means absolute and is carefully circumscribed by the Act itself.[18]

Under a constitutionally commanded and government supervised right-of-access system urged by respondents and mandated by the Court of Appeals, the Commission would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired. Regimenting broadcasters is too radical a therapy for the ailment respondents complain of.

Under the Fairness Doctrine the Commission's responsibility is to judge whether a licensee's overall performance indicates a sustained good faith effort to meet the public interest in being fully and fairly informed.[19]

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[18] See n. 8, *supra*.

[19] See Report on Editorializing by Broadcast Licensees, 13 F. C. C. 1246, 1251–1252 (1949).

The Commission's responsibilities under a right-of-access system would tend to draw it into a continuing case-by-case determination of who should be heard and when. Indeed, the likelihood of Government involvement is so great that it has been suggested that the accepted constitutional principles against control of speech content would need to be relaxed with respect to editorial advertisements.[20] To sacrifice First Amendment protections for so speculative a gain is not warranted, and it was well within the Commission's discretion to construe the Act so as to avoid such a result.[21]

The Commission is also entitled to take into account the reality that in a very real sense listeners and viewers constitute a "captive audience." Cf. *Public Utilities Commission* v. *Pollak*, 343 U. S. 451, 463 (1952); *Kovacs* v. *Cooper*, 336 U. S. 77 (1949). The "captive" nature of the broadcast audience was recognized as early as 1924, when Commerce Secretary Hoover remarked at the Fourth National Radio Conference that "the radio listener does not have the same option that the reader of publications has—to ignore advertising in which he is not interested—and he may resent its invasion on his set." [24] As the broadcast media became more prevasive in our society, the problem has become more acute. In a recent decision upholding the Commission's power to promulgate rules regarding cigarette advertising, Judge Bazelon,

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[20] See 85 Harv. L. Rev. 689, 697 (1973).

[21] DNC has urged in this Court that we at least recognize a right of our national parties to purchase airtime for the purpose of discussing public issues. We see no principled means under the First Amendment of favoring access by organized political parties over other groups and individuals.

[24] Reprinted in Hearings before the Senate Committee on Interstate Commerce on Radio Control, 69th Cong., 1st Sess., at 54 (1926).

writing for a unanimous Court of Appeals, noted some of the effects of the ubiquitous commercial:

> "Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are 'in the air.' In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word." *Banzhaff* v. *FCC*, 132 U. S. App. D. C. 14, 405 F. 2d 1082, 1100–1101 (1968), cert. denied, 396 U. S. 842 (1969).

It is no answer to say that because we tolerate pervasive commercial advertisement we can also live with its political counterparts.

The rationale for the Court of Appeals' decision imposing a constitutional right of access on the broadcast media was that the licensee impermissibly discriminates by accepting commercial advertisements while refusing editorial advertisements. The court relied on decisions holding that state supported school newspapers and public transit companies were forbidden by the First Amendment from excluding controversial editorial advertisements in favor of commercial advertisements.[22] The

[22] *Lee* v. *Board of Regents of State Colleges*, 306 F. Supp. 1097 (WD Wis. 1969), aff'd, 441 F. 2d 1257 (CA7 1971); *Zucker* v. *Panitz*, 229 F. Supp. 102 (SDNY 1969); *Kissinger* v. *New York*

court also attempted to analogize this case to some of our decisions holding that States may not constitutionally ban certain protected speech while at the same time permitting other speech in public areas. *Cox* v. *Louisiana*, 379 U. S. 536 (1965); *Fowler* v. *Rhode Island*, 354 U. S. 67 (1953); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951). This theme of "invidious discrimination" against protected speech is echoed in the briefs of BEM and DNC to this Court. Respondents also rely on our recent decisions in *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972), and *Police Dept. of City of Chicago* v. *Mosley*, 408 U. S. 92 (1972), where we held unconstitutional city ordinances that permitted "peaceful picketing of any school involved in a labor dispute," but prohibited demonstrations for any other purposes on the streets and sidewalks within 150 feet of the school.

Those decisions provide little guidance, however, in resolving the question whether the First Amendment required the Commission to mandate a private right of access to the broadcast media. In none of those cases did the forum sought for expression have an affirmative and independent statutory obligation to provide full and fair coverage of public issues, such as Congress has imposed on all broadcast licensees. In short, there is no "discrimination" against controversial speech present in this case. The question here is not whether there is to be discussion of controversial issues of public importance on the broadcast media, but rather who shall determine what issues are to be discussed by whom, and when.

The opinion of the Court of Appeals asserts that the Fairness Doctrine, insofar as it allows broadcasters to

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City Transit Authority, 274 F. Supp. 438 (SDNY 1967); *Hillside Community Church, Inc.* v. *City of Tacoma, Wash.*, 76 Wash. 2d 63, 455 P. 2d 350 (1969); *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Rptr. 430, 434 P. 2d 982 (1967).

exercise certain journalistic judgment over the discussion of public issues, is inadequate to meet the public's interest in being informed. The present system, the court held, "conforms . . . to a paternalistic structure in which licensees and bureaucrats decide what issues are 'important,' and how 'fully' to cover them, and the format, time and style of the coverage." 450 F. 2d, at 656. The forced sale of advertising time for editorial spot announcements would, according to the Court of Appeals majority, remedy this deficiency. That conclusion was premised on the notion that advertising time, as opposed to programming time, involves a "special and separate mode of expression" because advertising content, unlike programming content, is generally prepared and edited by the advertiser. Thus, that court concluded, a broadcaster's policy against using advertising time for editorial messages "may well ignore opportunities to enliven and enrich the public's overall information." 450 F. 2d, at 658. The Court of Appeals' holding would serve to transfer a large share of responsibility for balanced broadcasting from an identifiable, regulated entity—the licensee—to unregulated speakers who could afford the cost.

We reject the suggestion the Fairness Doctrine permits broadcasters to preside over a "paternalistic" regime. See *Red Lion, supra,* 395 U. S., at 390. That doctrine admittedly has not always brought to the public perfect or indeed even consistently high quality treatment of all public events and issues; but the remedy does not lie in diluting licensee responsibility. The Commission stressed that, while the licensee has discretion in fulfilling its obligations under the Fairness Doctrine, it is required to "present representative community views and voices on controversial issues which are of importance to his listeners," and it is forbidden from "excluding partisan

voices and always itself presenting views in a bland, inoffensive manner. . . ." 25 F. C. C. 2d, at 222. A broadcaster neglects that obligation only at the risk of losing his license.

Conceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable. Indeed, the Commission noted in these proceedings that the advent of cable television will afford increased opportunities for the discussion of public issues. In its proposed rules on cable television the Commission has provided that cable systems in major television markets

> "shall maintain at least one specially designated, non-commercial public access channel available on a first-come, nondiscriminatory basis. The system shall maintain and have available for public use at least the minimal equipment and facilities necessary for the production of programming for such channel." 37 Fed. Reg. 3289, § 76.251 (a)(4).

For the present, the Commission is conducting a wide-ranging study into the effectiveness of the Fairness Doctrine to see what needs to be done to improve the coverage and presentation of public issues on the broadcast media. Notice of Inquiry in Docket 19260, 30 F. C. C. 2d 26, 36 Fed. Reg. 11825. Among other things, the study will attempt to determine whether "there is any feasible method of providing access for discussion of public issues outside the requirements of the fairness doctrine." 30 F. C. C. 2d, at 33. The Commission made it clear, however, that it does not intend to discard the Fairness Doctrine or to require broadcasters to accept all private demands for air time.[23] The Commission's inquiry on

[23] Subsequent to the announcement of the Court of Appeals' decision, the Commission expanded the scope of the inquiry to comply with the Court of Appeals' mandate. Further Notice of Inquiry

this score was announced prior to the decision of the Court of Appeals in this case and hearings are underway.

The problems perceived by the Court of Appeals majority are by no means new; as we have seen, the history of the Communications Act and the activities of the Commission over a period of 40 years reflect a continuing search for means to achieve reasonable regulation compatible with the First Amendment rights of the public and the licensees. The Commission's pending hearings are but one step in this continuing process. At the very least, courts should not freeze this necessarily dynamic process into a constitutional holding. See *American Commercial Lines, Inc.* v. *Louisville R. Co.*, 392 U. S. 571, 590–593 (1968).

The judgment of the Court of Appeals is

Reversed.

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in Docket 19260, 33 F. C. C. 2d 554, 37 Fed. Reg. 3383. After we granted certiorari and stayed the mandate of the Court of Appeals, the Commission withdrew that notice of an expanded inquiry and continued its study as originally planned. Order and Further Notice of Inquiry in Docket 19260, 33 F. C. C. 2d 798, 37 Fed. Reg. 4980.

SUPREME COURT OF THE UNITED STATES

Nos. 71–863, 71–864, 71–865 AND 71–866

Columbia Broadcasting System, Inc., Petitioner, 71–863 *v.* Democratic National Committee. Federal Communications Commission et al., Petitioners, 71–864 *v.* Business Executives' Move for Vietnam Peace et al. Post-Newsweek Stations, Capital Area, Inc., Petitioner, 71–865 *v.* Business Executives' Move for Vietnam Peace. American Broadcasting Companies, Inc., Petitioner, 71–866 *v.* Democratic National Committee.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1973]

MR. JUSTICE STEWART, concurring.

While I join Parts I, II, and III of the Court's opinion, my views closely approach those expressed by MR. JUSTICE DOUGLAS in concurrence.

The First Amendment prohibits the Government from imposing controls upon the press.[1] Private broadcasters

[1] U. S. Const. Amend. I provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

are surely part of the press. *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166. Yet here the Court of Appeals held, and the dissenters today agree, that the First Amendment *requires* the Government to impose controls upon private broadcasters—in order to preserve First Amendment "values." The appellate court accomplished this strange convolution by the simple device of holding that private broadcasters *are* Government. This is a step along a path that could eventually lead to the proposition that private *newspapers* "are" Government. Freedom of the press would then be gone. In its place we would have such governmental controls upon the press as a majority of this Court at any particular moment might consider First Amendment "values" to require. It is a frightening specter.

I

There is some first blush appeal in seeking out analogies from areas of the law where governmental involvement on the part of otherwise private parties has led the Court to hold that certain activities of those parties were tantamount to governmental action.[2] The evolution of the "state action" concept under the Fourteenth Amendment is one available analogy.[3] Another is the decision of this

[2] See *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U. S. 308; *Railway Employees' Department* v. *Hanson*, 351 U. S. 225; *Public Utilities Commission* v. *Pollak*, 343 U. S. 451; *Marsh* v. *Alabama*, 326 U. S. 501.

[3] "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans* v. *Newton*, 382 U. S. 296. Earlier, in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, the Court held that a privately owned restaurant located within a public parking garage was sufficiently involved with state authority to bring its racially discriminatory actions within the proscription of the Fourteenth Amendment.

Court in *Public Utilities Commission* v. *Pollak*, 343 U. S. 451, where a policy of a privately owned but publicly regulated bus company that had been approved by the regulatory commission was held to activate First Amendment review. The First Amendment has also been held applicable where private parties control essentially public forums. *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308, *Marsh* v. *Alabama*, 326 U. S. 501; cf. *Lloyd Corp.* v. *Tanner*, 407 U. S. 551.

The problem before us, however, is too complex to admit of solution by simply analogizing to cases in very different areas. For we deal here with the electronic press, that is itself protected from Government by the First Amendment.[4] Before woodenly accepting analogies from cases dealing with quasi-public racial discrimination, regulated industries other than the press, or "company towns," we must look more closely at the structure of broadcasting and the limits of governmental regulation of licensees.

When Congress enacted the Radio Act of 1927, 44 Stat. 1162, and followed it with the Federal Communications Act of 1934, 47 U. S. C. § 151 *et seq.*, it was responding to a then evident need to regulate access to the public airwaves. Not every member of the public could broadcast over the air as he chose, since the scarcity of frequencies made this a sure road to chaos.[5] The system selected by the Congress was a hybrid. The Federal Radio Commission (succeeded by the Federal Communications Com-

[4] See, *e. g.*, *United States* v. *Paramount Pictures, Inc.*, 344 U. S. 131, 166. The Federal Communications Act also prohibits the Commission from interfering with "the right of free speech by means of radio communication." 47 U. S. C. § 326.

[5] For a history of regulatory legislation regarding broadcasters, see *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 375–386; *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 210–214.

mission), was to license broadcasters for no more than three year periods. 47 U. S. C. § 307 (d). The licensees, though subject to some public regulation, were to be private companies.

Scarcity meant more than a need to limit access. Because access was to be limited, it was thought necessary for the regulatory apparatus to take into account the public interest in obtaining "the best practicable service to the community reached by his [the licensee's] broadcasts." *FCC* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 475. Public regulation has not, then, been merely a matter of electromagnetic engineering for the sake of keeping signals clear. It has also included some regulation of programming. Writing in defense of Commission regulations regarding chain broadcasting, Mr. Justice Frankfurter said: "These provisions, [of the Act] individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more effective use of radio in the public interest.'" *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 217.

Over time, federal regulation of broadcasting in the public interest has been extensive, and, *pro tanto*, has rightly or wrongly been held to be tolerable under the First Amendment. We now have the Fairness Doctrine, with its personal attack, editorial reply, and fair coverage of controversial issue requirements.[6] In *Red Lion Broad-*

[6] The personal attack and editorial reply rules appear at 47 CFR §§ 73.123, 73.300, 73.598, 73.679. The public issue aspect of the Fairness Doctrine requires the broadcaster to give adequate coverage to public issues, fairly reflecting divergent views. *United Broadcasting Co.*, 10 F. C. C. 515; *New Broadcasting Co.*, 6 P & F Radio Reg. 258; see generally Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415. This coverage must be provided at the broadcaster's

casting Co. v. *FCC*, 395 U. S. 367, this Doctrine was held to constitute permissible governmental regulation of broadcasters, despite the First Amendment. The Court said:

> "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. . . . Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." 395 U. S., at 388, 390.

The Fairness Doctrine has been held applicable to paid advertising as well as to other programming, *Banzhaf* v. *FCC*, 405 F. 2d 1082. And the public interest in broadcasting has been recognized as a rationale for liberalized standing on the part of listener groups in Commission licensing proceedings. *Office of Communication of United Church of Christ* v. *FCC*, 359 F. 2d 994.

Throughout this long history of regulation, however, it has been recognized that broadcasters retain important freedoms, and that the Commission's regulatory power has limits. Quite apart from what may be required by the First Amendment itself, the regulatory legislation

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own expense if necessary, *Cullman Broadcasting Co.*, 25 P & F Radio Reg. 895, and the duty must be met by providing programming obtained at the licensee's own initiative if it is available from no other source. *John J. Dempsey*, 6 P & F Radio Reg. 615.

makes clear what some of these freedoms are. Section 3 (h) of the Act, 47 U. S. C. § 153 (h), provides that broadcasters are not to be treated as common carriers. Were broadcasters common carriers within the meaning of the Act, they would be subject to 47 U. S. C. §§ 201, 202. Section 201 provides, in pertinent part, that:

> "(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor . . . ."

Section 202 provides that:

> "(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

The Act also specifically gives licensees "freedom of speech":

> "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U. S. C. § 326.

Thus, when examined as a whole, the Federal Communications Act establishes a system of privately owned

broadcast licensees. These licensees, though regulated by the Commission under a fairly broad "public interest" standard, have, quite apart from whatever additional protections the First Amendment may provide, important statutory freedoms in conducting their programming.

In *Red Lion, supra,* this Court held that, despite the First Amendment, the Commission may impose a so-called Fairness Doctrine upon broadcasters, requiring them to present balanced coverage of various and conflicting views on issues of public importance. I agreed with the Court in *Red Lion,* although with considerable doubt, because I thought that that much government regulation of program content was within the outer limits of First Amendment tolerability. Were the Commission to require broadcasters to accept some amount of editorial advertising as part of the public interest mandate upon which their licenses are conditional, the issue before us would be in the same posture as was the Fairness Doctrine itself in *Red Lion,* and we would have to determine whether this additional governmental control of broadcasters was consistent with the statute and tolerable under the First Amendment. Here, however, the Commission imposed no such requirement, but left private broadcasters free to accept or reject such advertising as they saw fit. The Court of Appeals held that the First Amendment *compels* the Commission to require broadcasters to accept such advertising, because it equated broadcaster action with governmental action. This holding not only raises a serious statutory question under § 3 (h) of the Act, which provides that broadcasters are not common carriers, but seems to me to reflect an extraordinarily odd view of the First Amendment.

The dissenting opinion today argues, in support of the decision of the Court of Appeals, that only a *limited* right of access is sought by the respondents and required by the First Amendment, and that such a limited right

would not turn broadcasters into common carriers. The respondents argue, somewhat differently, that the Constitution requires that only "responsible" individuals and groups be given the right to purchase advertising. These positions are said to be arrived at by somehow balancing "competing First Amendment values." But if private broadcasters *are* Government, how can the First Amendment give only a *limited* right to those who would speak? Since when has the First Amendment given Government the right to silence all speakers it does not consider "responsible?"

The First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the Government.[7] To hold that broadcaster action is governmental action would thus simply strip broadcasters of their own First Amendment rights. They would be obligated to grant the demands of all citizens to be heard over the air, subject only to reasonable regulations as to "time and manner." Cf. *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 98; *Cox* v. *Louisiana*, 379 U. S. 536, 554; *Poulos* v. *New Hampshire*, 345 U. S. 395; *Cox* v. *New Hampshire*, 312 U. S. 569. If, as the dissent today would have it, the proper analogy is to public forums[8]—that is, if broadcasters are Government for First Amendment purposes—then broadcasters are inevitably drawn to the position of common carriers. For

[7] Government is not restrained by the First Amendment from controlling its own expression, cf. *New York Times Co.* v. *United States*, 403 U. S. 713, 728–729 (STEWART, J., concurring). As Professor Emerson has written, "The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents." T. Emerson, The System of Freedom Expression 700 (1970).

[8] "[T]he right to speak can flourish only if it is allowed to operate in an effective forum—whether it be a public park, a schoolroom, a town meeting hall, a soapbox, or a radio and television frequency." *Post*, at —.

this is precisely the status of Government with respect to public forums—a status mandated by the First Amendment.[9]

To hold that broadcaster action is governmental action would thus produce a result wholly inimical to the broadcasters' own First Amendment rights, and wholly at odds with the broadcasting system established by Congress and with our many decisions [10] approving those legislative provisions.[11] As Judge McGowan wrote, dissenting from the judgment of the Court of Appeals in these cases,

> "This is the system which Congress has, wisely or not, provided as the alternative to public ownership

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[9] Professor Emerson has recognized the scope of the "access" argument: "The licensee therefore can only be considered as the agent of the government, or the trustee of the public, in a process of further allocation. Hence the licensee would have no direct First Amendment rights of his own, except as to his own expression." T. Emerson, The System of Freedom of Expression 663 (1970).

Though the licensee would be free to say what it wished during its *own* broadcasting, whatever that might mean, it seems clear that the licensee would have no special claim to broadcast time and would lose entirely the freedom to program and schedule according to its own judgment, values and priorities. Cf. *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 98; *Cox* v. *Louisiana*, 379 U. S. 536, 554; *Poulos* v. *New Hampshire*, 345 U. S. 395; *Cox* v. *New Hampshire*, 312 U. S. 569. Licensees would be forced to develop a procedurally fair and substantively nondiscriminatory system for controlling access, and in my view this is precisely what Congress intended to avoid through § 3 (h) of the Act.

[10] *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367; *National Broadcasting Co.* v. *United States*, 319 U. S. 190; *FCC* v. *Sanders Brothers Radio Station*, 309 U. S. 470; *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134.

[11] None of this suggests any disagreement on my part with the evolution of "state action" under the Fourteenth Amendment. I recognize that if *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, were relevant, the fact that the Commission considered and rejected a challenge to broadcaster policy might be sufficient to constitute "state action." This, in fact, was the basis of the Court's decision in *Public Utilities Commission* v. *Pollak*, 343 U. S. 451.

and operation of radio and television communications facilities. This approach has never been thought to be other than within the permissible limits of constitutional choice." 450 F. 2d 642, 666.

II

Part IV of the Court's opinion, as I understand it, seems primarily to deal with the respondents' statutory argument—that the obligation of broadcasters to operate in the "public interest" supports the judgment of the Court of Appeals. Yet two of my concurring Brethren understand Part IV as a discussion of the First Amendment issue that would exist in these cases were the action of broadcasters to be equated with governmental action. So, according to my Brother BLACKMUN, "the governmental action issue does not affect the outcome of this case." *Post,* at —. The Court of Appeals also conflated the constitutional and statutory issues in these cases. It reasoned that whether its decision "is styled as a 'First Amendment decision' or as a decision interpreting the fairness and public interest requirements 'in light of the First Amendment' matters little." 450 F. 2d 642, at 649.

I find this reasoning quite wrong and wholly disagree with it, for the simple reason that the First Amendment and the public interest standard of the statute are not coextensive. The two are related in the sense that the Commission could not "in the public interest" place a requirement on broadcasters that constituted a violation of their First Amendment rights. The two are also related in the sense that both foster free speech. But we have held that the Commission can under the statute require broadcasters to do certain things "in the public interest" that the First Amendment would not require if the broadcasters *were* the Government. For example,

the Fairness Doctrine is an aspect of the "public interest" regulation of broadcasters that would not be compelled or even permitted by the First Amendment itself if broadcasters were the Government.[12]

If the "public interest" language of the statute were intended to enact the substance of the First Amendment, a discussion of whether broadcaster action is governmental action would indeed be superfluous. For anything that Government could not do because of the First Amendment, the broadcasters could not do under the statute. But this theory proves far too much, since it would make the statutory scheme, with its emphasis on broadcaster discretion and its proscription on interference with "the right of free speech by means of radio communication," a nullity. Were the Government really operating the electronic press, it would, as my Brother DOUGLAS points out, be *prevented* by the First Amendment from selection of broadcast content and the exercise of editorial judgment. It would not be permitted in the name of "fairness" to deny time to any person or group on the grounds that their views had been heard "enough." Yet broadcasters perform precisely these

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[12] The basis for a Fairness Doctrine is statutory, not constitutional. As the Court said in *Red Lion:*

"In light of the fact that the 'public interest' in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public; the fact that the FCC has rested upon that language from its very inception a doctrine that these issues must be discussed, and fairly; and the fact that Congress has acknowledged that the analogous provisions of § 315 are not preclusive in this area, and knowingly preserved the FCC's complementary efforts, we think the fairness doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority." 395 U. S., at 385.

functions and enjoy precisely these freedoms under the Act. The constitutional and statutory issues in these cases are thus quite different.

In evaluating the statutory claims, the starting point must be the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. . . ." *Red Lion, supra,* at 381.

Though I have no doubt that the respondents here were attempting to communicate what they considered to be important messages, it does not follow that the Commission erred when it refused to require every broadcaster to communicate those messages. Contrary to what is said in dissent today, it is not the case that a seller of goods is granted instant access to the media, while somone "seeking to discuss war, peace, pollution or the suffering of the poor is denied this right to speak." *Post,* at —. There is no indication that the thousands of broadcasters regulated by the Commission have anything like a uniform policy of turning down "controversial" or "editorial" advertising. In the cases before us, the Business Executives' spot advertisements were rejected by a single radio station. Of the three television networks, only one turned down the Democratic National Committee's request for air time. We are told that many, if not most, broadcasters *do* accept advertising of the type at issue here. This variation in broadcaster policy reflects the very kind of diversity and competition that best protects the free flow of ideas under a system of broadcasting predicated on private management.[13]

Even though it would be in the public interest for the

[13] The Democratic National Committee cited this very lack of uniformity as a reason for seeking a declaratory ruling from the Commission. There was too much diversity, it thought, for it to

respondents' advertisements to be heard, it does not follow that the public interest requires *every* broadcaster to broadcast them. And it certainly does not follow that the public interest would be served by *forcing* every broadcaster to accept any particular kind of advertising. In the light of these diverse broadcaster policies—and the serious First Amendment problem that a contrary ruling would have presented—there are surely no "compelling indications" that the Commission misunderstood its statutory responsibility.

III

There is never a paucity of arguments in favor of limiting the freedom of the press. The Court of Appeals concluded that greater government control of press freedom is acceptable here because of the scarcity of frequencies for broadcasting. But there are many more broadcasting stations than there are daily newspapers.[14] And it would require no great ingenuity to argue that newspapers too *are* Government. After all, newspapers get Government mail subsidies and a limited antitrust immunity.[15] The reasoning of the Court of Appeals would

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plan effectively an advertising campaign. In the DNC's request for a declaratory ruling before the Commission, it stated:

"In addition to the three national commercial networks, as of April 1, 1970, there were, on the air, 509 commercial VHF television stations, 180 commercial UHF stations, 4,280 standard broadcast stations, and 2,111 commercial FM stations. While several of these stations have common owners, it does not necessarily follow that every station owned by an individual or group would follow the same policies."

[14] There are 1,792 daily newspapers in the United States. Ayer Directory of Publications (1973) VIII. Compare the number of broadcasters, n. 13, *supra*.

[15] Newspapers and other periodicals receive a government subsidy in the form of second-class postage rates, 39 CFR § 132. An antitrust immunity is established by the Newspaper Preservation Act, 15 U. S. C. § 1801 *et seq.*

then lead to the conclusion that the First Amendment requires that newspapers too be compelled to open their pages to all comers.

Perhaps I overstate the logic of the opinion of the Court of Appeals. Perhaps its "balancing" of First Amendment "values" would require no more than that newspapers be compelled to give "limited" access to dissident voices, and then only if those voices were "responsible." And perhaps it would require that such access be compelled only when there was a single newspaper in a particular community. But it would be a close question for me which of these various alternative results would be more grossly violative of the First Amendment's guarantee of a free press. For that guarantee gives *every* newspaper the liberty to print what it chooses and reject what it chooses, free from the intrusive editorial thumb of Government.

I profoundly trust that no such reasoning as I have attributed to the Court of Appeals will ever be adopted by this Court. And if I have exaggerated, it is only to make clear the dangers that beset us when we lose sight of the First Amendment itself, and march forth in blind pursuit of its "values."

Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that "fairness" was far too fragile to be left for a government bureaucracy to accomplish. History has many times confirmed the wisdom of their choice.

This Court was persuaded in *Red Lion* to accept the Commission's view that a so-called Fairness Doctrine was required by the unique electronic limitations of broadcasting, at least in the then-existing state of the art. Rightly or wrongly, we there decided that broadcasters' First Amendment rights were "abridgeable." But surely this does not mean that those rights are nonexistent.

And even if all else were in equipoise, and the decision of the issue before us were finally to rest upon First Amendment "values" alone, I could not agree with the Court of Appeals. For if those "values" mean anything, they should mean at least this: If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom.

SUPREME COURT OF THE UNITED STATES

Nos. 71–863, 71–864, 71–865, AND 71–866

Columbia Broadcasting System, Inc., Petitioner,
71–863 *v.*
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71–865 *v.*
Business Executives' Move for Vietnam Peace.

American Broadcasting Companies, Inc., Petitioner,
71–866 *v.*
Democratic National Committee.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1973]

MR. JUSTICE WHITE, concurring.

I join Parts I, II and IV of the Court's opinion and its judgment. I do not, however, concur in Part III of the opinion.

I do not suggest that the conduct of broadcasters must always, or even often, be considered that of a government for the purposes of the First Amendment. But it is at

least arguable, and strongly so, that the Communications Act and the policies of the Commission, including the Fairness Doctrine, are here sufficiently implicated to require review of the Commission's orders under the First Amendment. For myself, the heart of the argument is simply stated. The claim in these cases was that the Communications Act and the First Amendment should be interpreted to confer a right of access on those who wished to buy time for editorial advertising and to raise political funds. The Commission rejected both the statutory and constitutional positions. To confer a right of access, it said, would be contrary to the Communications Act and to the policies adopted by the Commission to implement that Act. Congress intended that the Fairness Doctrine be complied with, but it also intended that broadcasters have wide discretion with respect to the method of compliance. There is no requirement that broadcasters accept editorial ads; they could, instead, provide their own programs, with their own format, opinion and opinion sources. Congress intended that there be no *right* of access such as claimed in these cases; and, in the Commission's view, to recognize that right would require major revisions in statutory and regulatory policy. The Commission also ruled, contrary to the views of its dissenting member, that rejection of the asserted right of access was wholly consistent with the First Amendment.

In this context I am not ready to conclude, as the Court does in Part III, that the First Amendment may be put aside for lack of official action necessary to invoke its proscriptions. But, assuming *arguendo*, as the Court does in Part IV of its opinion, that Congress or the Commission is sufficiently involved in the denial of access to the broadcasting media to require review under the First Amendment, I would reverse the judgment of

the Court of Appeals. Given the constitutionality of the Fairness Doctrine, and accepting Part IV of the Court's opinion, I have little difficulty in concluding that statutory and regulatory recognition of broadcaster freedom and discretion to make up their own programs and to choose their method of compliance with the Fairness Doctrine is consistent with the First Amendment.

SUPREME COURT OF THE UNITED STATES

Nos. 71–863, 71–864, 71–865, AND 71–866

Columbia Broadcasting System, Inc., Petitioner, 71–863 *v.* Democratic National Committee. Federal Communications Commission et al., Petitioners, 71–864 *v.* Business Executives' Move for Vietnam Peace et al. Post-Newsweek Stations, Capital Area, Inc., Petitioner, 71–865 *v.* Business Executives' Move for Vietnam Peace. American Broadcasting Companies, Inc., Petitioner, 71–866 *v.* Democratic National Committee.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1973]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE POWELL joins, concurring.

In Part IV the Court determines "whether, assuming governmental action, broadcasters are required" to accept editorial advertisements "by reason of the First Amendment." *Ante*, at p. 26. The Court concludes that the Court of Appeals erred when it froze the "continuing

search for means to achieve reasonable regulation compatible with the First Amendment rights of the public and the licensees" into "a constitutional holding." *Ante*, at p. 37. The Court's conclusion that the First Amendment does not compel the result reached by the Court of Appeals demonstrates that the governmental action issue does not affect the outcome of this case. I therefore refrain from deciding it.

SUPREME COURT OF THE UNITED STATES

Nos. 71–863, 71–864, 71–865, AND 71–866

Columbia Broadcasting System, Inc., Petitioner, 71–863 *v.* Democratic National Committee. Federal Communications Commission et al., Petitioners, 71–864 *v.* Business Executives' Move for Vietnam Peace et al. Post-Newsweek Stations, Capital Area, Inc., Petitioner, 71–865 *v.* Business Executives' Move for Vietnam Peace. American Broadcasting Companies, Inc., Petitioner, 71–866 *v.* Democratic National Committee.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1973]

MR. JUSTICE DOUGLAS.

While I join the Court in reversing the judgment below, I do so for quite different reasons.

My conclusion is that the TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines. The philosophy of the First Amendment requires that result, for the fear that

Madison and Jefferson had of government intrusion is perhaps even more relevant to TV and radio than it is to newspapers and other like publications. That fear was founded not only on the spectre of a lawless government but of government under the control of a faction that desired to foist its views of the common good on the people. In popular terms that view has been expressed as follows:

> "The ground rules of our democracy, as it has grown, require a free press, not necessarily a responsible or a temperate one. There aren't any halfway stages. As Aristophanes saw, democracy means that power is generally conferred on second-raters by third-raters, whereupon everyone else, from first-raters to fourth-raters, moves with great glee to try to dislodge them. It's messy but most politicians understand that it can't very well be otherwise and still be a democracy." Douglas J. Stewart, Brandeis University, reviewing Epstein, News From Nowhere: Television and the News (1972), Book World, Washington Post, March 25, 1973, pp. 4–5.

I

Public broadcasting, of course, raises quite different problems from those tendered by the TV outlets involved in this litigation.

Congress has authorized the creation of the Corporation for Public Broadcasting, whose Board of Directors is appointed by the President by and with the advice and consent of the Senate. 47 U. S. C. § 396. A total of 223 television and 560 radio stations made up this nationwide public broadcasting system as of June 30, 1972. See 1972 Corporation for Public Broadcasting, Annual Report. It is a nonprofit organization and by the terms of § 396 (b) is said not to be "an agency or establishment of the United States Government." Yet, since it is a creature of Con-

gress whose management is in the hands of a Board named by the President and approved by the Senate, it is difficult to see why it is not a federal agency engaged in operating a "press" as that word is used in the First Amendment. If these cases involved that Corporation, we would have a situation comparable to that in which the United States owns and manages a prestigious newspaper like the New York Times, Washington Post, and Sacramento Bee. The government as owner and manager would not, as I see it, be free to pick and choose such news items as it desired. For by the First Amendment it may not censor or enact or enforce any other "law" abridging freedom of the press. Politics, ideological slants, rightist or leftist tendencies could play no part in its design of programs. See Markel, Will It be Public or Private TV, World, March 13, 1973, p. 57; Shales, WGBH–TV, Washington Post, April 27, 1973, p. E2. More specifically, the programs tendered by the respondents in the present cases could not then be turned down.

Governmental action may be evidenced by various forms of supervision or control of private activities. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715. I have expressed the view that the activities of licensees of the government operating in the public domain are governmental actions, so far as constitutional duties and responsibilities are concerned. See *Garner* v. *Louisiana*, 368 U. S. 157, 183–185 (concurring); *Lombard* v. *Louisiana*, 373 U. S. 267, 281 (dissenting); *Moose Lodge* v. *Irvis*, 407 U. S. 163, 179 (dissenting). It is somewhat the same idea expressed by the first Mr. Justice Harlan in his dissent in *Plessy* v. *Ferguson*, 163 U. S. 537, 554. But that view has not been accepted. If a TV or radio licensee were a federal agency, the thesis of my Brother BRENNAN would inexorably follow. For a license of the Federal Government would be in precisely the situation of the Corporation for Public Broadcasting. A

licensee, like an agency of the government, would within limits of its time be bound to disseminate all views. For being an arm of the government it would be unable by reason of the First Amendment to "abridge" some sectors of thought in favor of others. The Court does not, however, decide whether a broadcast licensee is a federal agency within the context of this case.

II

If a broadcast license is not engaged in governmental action for purposes of the First Amendment, I fail to see how constitutionally we can treat TV and the radio differently than we treat newspapers. It would come as a surprise to the public as well as to publishers and editors of newspapers to be informed that a newly created federal bureau would hereafter provide "guidelines" for newspapers or promulgate rules that would give a federal agency power to ride herd on the publishing business to make sure that fair comment on all current issues was made. In 1970 Congressman Farbstein introduced a bill,[1] never reported out of the Committee, which provided that any newspaper of general circulation published in a city with a population greater than 25,000 and in which fewer than two separately owned newspapers of general circulation are published "shall provide a reasonable opportunity for a balanced presentation of conflicting views on issues of public importance" and giving the Federal Communications Commission power to enforce the requirement.

Thomas I. Emerson, our leading First Amendment scholar has stated that

> ". . . any effort to solve the broader problems of a monopoly press by forcing newspapers to cover all 'newsworthy' events and print all viewpoints, under the watchful eyes of petty public officials, is

[1] H. R. 18927, 91st Cong., 2d Sess. (1970).

> likely to undermine such independence as the press now shows without achieving any real diversity." The System of Freedom of Expression (1970), p. 671.

The sturdy people who fashioned the First Amendment would be shocked at that intrusion of government into a field which in this Nation has been reserved for individuals, whatever part of the spectrum of opinion they represent. Benjamin Franklin, one of the Founders who was in the newspaper business, wrote in simple and graphic form what I had always assumed was the basic American newspaper tradition that became implicit in the First Amendment:

> "In our early history one view was that the publisher must open his columns 'to any and all controversialists, especially if paid for it.'" Mott, American Journalism, 55 (1962).
>
> "Franklin disagreed, declaring that his newspaper was not a stagecoach, with seats for everyone; he offered to print pamphlets for private distribution, but refused to fill his paper with private altercations."[2] *Ibid.*

It is said that TV and the radio have become so powerful and exert such an influence on the public mind that they must be controlled by government.[3] Some

[2] Congress provided in 47 U. S. C. § 153 (h) that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

[3] "To say that the media have great decision-making powers without defined legal responsibilities or any formal duties of public accountability is both to overestimate their power and to put forth a meaningless formula for reform. How shall we make the *New York Times* 'accountable' for its anti-Vietnam policy? Require it to print letters to the editor in support of the war? If the situation is as grave as stated, the remedy is fantastically inadequate. But the situation is not that grave. The *New York Times*, the *Chicago Tribune*, NBC, ABC, and CBS play a role in policy formation, but clearly they were not alone responsible, for example,

newspapers in our history have exerted a powerful—and some have thought—a harmful interest on the public mind. But even Thomas Jefferson, who knew how base and obnoxious the press could be, never dreamed of interfering. For he thought that government control of newspapers would be the greater of two evils.[4]

> "I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them. . . . These ordures are rapidly depraving the public taste.
>
> "It is however an evil for which there is no remedy, Our liberty depends on the freedom of the press, and that cannot be limited without being lost."

Of course there is private censorship in the newspaper field. But for one publisher who may suppress a fact, there are many who will print it. But if the government is the censor, administrative *fiat* not freedom of choice carries the day.

As stated recently by Harry Kalven, Jr.:

> "It is an insufficiently noticed aspect of the First Amendment that it contemplates the vigorous use of self-help by the opponents of given doctrines, ideas, and political positions. It is not the theory

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for Johnson's decision not to run for re-election, Nixon's refusal to withdraw the troops from Vietnam, the rejection of the two billion dollar New York bond issue, the defeat of Carswell and Haynsworth, or the Supreme Court's segregation, reapportionment and prayer decisions. The implication that the people of this country—except the proponents of the theory—are mere unthinking automatons manipulated by the media, without interests, conflicts, or prejudices is an assumption which I find quite maddening. The development of constitutional doctrine should not be based on such hysterical overestimation of media power and underestimation of the good sense of the American public." Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768, 786–787 (1972).

[4] Democracy by Thomas Jefferson (Padover ed. 1939), pp. 150–151.

that all ideas and positions are entitled to flourish under freedom of discussion. It is rather then that they must survive and endure against hostile criticism. There is perhaps a paradox in that the suppression of speech by speech is part and parcel of the principle of freedom of speech. Indeed, one big reason why policy dictates that government keep its hands off communication is that, in this area, self-help of criticism is singularly effective . . . .

"Free, robust criticism of government, its officers, and its policy is the essence of the democratic dialectic—of 'the belief,' again to quote Brandeis, 'in the power of reason as applied through public discussion.' The government cannot reciprocally criticize the performance of the press, its officers, and its policies without criticism carrying implications of power and coercion. The government simply cannot be another discussant of the press's performance. Whether it will it or not, it is a critic who carries the threat of the censor and more often than not it wills it. Nor is it all all clear that its voice will be needed; surely there will be others to champion its view of the performance of the press.

"The balance struck, then, is avowedly, and even enthusiastically, one-sided. The citizen may criticize the performance and motives of his government. The government may defend its performance and its policies, but it may not criticize the performance and motives of its critics." VI The Center Magazine, No. 3 (May/June 1973), pp. 36–37.

Red Lion Broadcasting Co. v. *FCC*, 395 U. S. 36, in a carefully written opinion that was built upon predecessor cases put the TV and the radio under a different regime. I did not participate in that decision and, with all respect, would not support it. The Fairness Doctrine has no place in our First Amendment regime. It puts the head

of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends. In 1973—as in other years—there is clamoring to make the TV and radio emit the messages that console certain groups. There are charges that these mass media are too slanted, too partisan, too hostile in their approach to candidates and the issues.

The same cry of protest has gone up against the newspapers and magazines. When Senator Joseph McCarthy was at his prime, holding in his hand papers containing the names of 205 communists in the State Department (Feuerlicht, Joe McCarthy and McCarthyism (1972) p. 54), there were scarcely a dozen papers in this Nation that stood firm for the citizen's right to due process and to First Amendment protection. That, however, was no reason to put the saddle of the federal bureaucracy on the backs of publishers. Under our Bill of Rights people are entitled to have extreme ideas, silly ideas, partisan ideas.

The same is true, I believe, of the TV and radio. At times they have a nauseating mediocrity. At other times they show the dazzling brilliance of a Leonard Bernstein; and they very often bring humanistic influences of faraway people into every home.

Both TV and radio news broadcasts frequently tip the news one direction or another and even try to turn a public figure into a character of disrepute. Yet so do the newspapers and the magazines and other segments of the press. The standards of TV, radio, newspapers, or magazines—whether of excellence or mediocrity—are beyond the reach of government. Government—acting through courts—disciplines lawyers. Government makes crinimal some acts of doctors and of engineers. But the First Amendment puts beyond the reach of government federal regulation of news agencies save only business or financial practices which do not in-

volve First Amendment rights. Conspicuous is *Associated Press* v. *United States*, 326 U. S. 1, where enforcement of the antitrust laws against a news gathering agency was held to be not inconsistent with First Amendment rights.

Government has no business in collating, dispensing, and enforcing, subtly or otherwise, any set of ideas on the press. Beliefs, proposals for change, clamor for controls, protests against any governmental regime are protected by the First Amendment against governmental ban or control.

There has been debate over the meaning of the First Amendment as applied to the States by reason of the Fourteenth. Some have thought that at the state level the First Amendment was somewhat "watered down" and did not have the full vigor which it had as applied to the Federal Government. See *Roth* v. *United States*, 354 U. S. 476, 502–503 (Harlan, J., concurring). So far, that has been the minority view. See *Malloy* v. *Hogan*, 378 U. S. 1, 10. But it is quite irrelevant here, for the First Amendment, like other parts of the Bill of Rights, was at the outset applicable only to the Federal Government.[5] The First Amendment is written in terms that are absolute. Its command is that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

That guarantee, can, of course, be changed by a constitutional amendment which can make all the press or segments of the press organs of government and thus control the news and information which people receive. Such a restructuring of the First Amendment cannot be done by judicial fiat or by congressional action. The ban of "no" law that abridges freedom of the press is in my view total and complete.[6] The Alien and Sedition Acts,

[5] *Barron* v. *Mayor of Baltimore*, 7 Pet. 243.

[6] The press in this country, like that of Britain, was at one time subject to contempt for its comments on pending litigation. *Toledo*

1 Stat. 566, 570, 596, passed early in our history were plainly unconstitutional, as Jefferson believed. Jefferson, indeed, said that by reason of the First Amendment

> "libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals. That therefore the act of the Congress of the United States, passed on the 14th of July, 1798, entitled 'An Act in Addition to the Act entitled "An Act for the Punishment of certain Crimes against the United States," ' which does abridge the freedom of the press, is not law, but is altogether void, and of no force." 4 Elliot's Debates on the Federal Constitution (1876), p. 541.

And see 15 Writings of Thomas Jefferson (mem. ed. 1904), p. 214; 14 *id.*, at 116; 11 *id.*, at 43–44).

Those Acts had but a short life, and we never returned to them. We have, however, witnessed a slow encroachment by government over that segment of the press that is represented by TV and radio licensees. Licensing is necessary for engineering reasons; the spectrum is limited and wavelengths must be assigned to avoid stations interfering[7] with each other. *Red Lion Broad-*

Newspaper Co. v. *United States*, 247 U. S. 402. But that position was changed. See *Bridges* v. *California*, 314 U. S. 252, 267. Federal habeas corpus, however, is available to give a man his freedom and the prosecution an opportunity for a new trial where the conduct of the press has resulted in an unfair trial. *Sheppard* v. *Maxwell*, 384 U. S. 33. And change of venue may be had where the local atmosphere has saturated the community with prejudice. See *Rideau* v. *Louisiana*, 373 U. S. 723.

[7] The Senate Report which accompanied the bill that became the Radio Act of 1927, 44 Stat. 1162 stated:

"If the channels of radio transmission were unlimited in number the importance of the regulatory body would be greatly lessened, but these channels are limited and restricted in number and the decision as to who shall be permitted to use them and on what terms and for what periods of time, together with the other questions connected

casting Co. v. *FCC*, *supra*, at 388. The Commission has a duty to encourage a multitude of voices but only in a limited way, *viz:* by preventing monopolistic practices and by promoting technological developments that will open up new channels.[8] But censorship[9] or editing or

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with the situation, requires the exercise of a high order of discretion and the most careful application of the principles of equitable treatment to all the classes and interests affected. For these and other reasons your committee decided that all power to regulate radio communication should be centered in one independent body, a radio commission, granting it full and complete authority over the entire subject of radio." S. Rep. 772, 69th Cong., 1st Sess., p. 3.

[8] Scarcity may soon be a constraint of the past, thus obviating the concerns expressed in *Red Lion*. It has been predicted that it may be possible within 10 years to provide television viewers 400 channels through the advances of cable television. Smith, The Wired Nation 7 (1972); see *Brandywine-Maine Line Radio, Inc.* v. *Federal Communications Commission*, 473 F. 2d 16, 73–76 (Bazelon, J., dissenting).

[9] Currently, press censorship covers most of the globe. In Brazil the present regime of censorship is pervasive. As reported in the New York Times for Feb. 17, 1973, p. 11:

"The censors' rules, issued a few months ago and constantly amended, cover a vast field and if strictly applied would leave the press little to discuss. In practice, however, much depends on the whims and suspicions of the local censors.

"General prohibitions include protests against censorship, and discussion of a successor to President Emilio Garrastazu Médici, whose term is up in 1974, campaigns against the Government's special powers by decree and sensational news that might hurt the image of Brazil.

"Others are campaigns to discredit the national housing program, the financial market or other matters of vital importance to the Government, the playing up of assaults on banks or credit establishments, tension between the Roman Catholic Church and the state, agitation in union and student circles, and publicity for Communist personalities and nations. Criticism of state governors and 'exaltation of immorality' through news of homosexuality, prostitution and drugs are also barred.

"The most controversial order, issued by the Minister of Justice last September, bans all news, comment or interviews on a political

the screening by government of what licensees may broadcast goes against the grain of the First Amendment.

The Court in *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 226, said, "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation."

That uniqueness is due to engineering and technical problems. But the press in a realistic sense is likewise not available to all. Small or "underground" papers appear and disappear; and the weekly is an established institution. But the daily papers now established are unique in the sense that it would be virtually impossible for a competitor to enter the field due to the financial exigencies of this era. The result is that in practical terms the newspapers and magazines, like the TV and radio, are available only to a select few. Who at this time would have the folly to think he could combat the New York Times or Denver Post by building a new plant and becoming a competitor? That may argue for a redefinition of the responsibilities of the press in First Amendment terms.[10] But I do not think it gives us

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relaxation of the regime, on democracy for Brazil, and on the economic and financial situation in general."

[10] Indeed, it can be argued that the existence of newspapers, and thus their access to the public, is dependent upon the preferential mailing privileges newspapers receive through second-class postage rates. This is a privilege afforded by the government, and, as my Brother STEWART recognizes, a form of subsidy.

Under the Postal Reorganization Act, the new Postal Rate Commission is empowered to fix postage rates at levels high enough to make each class of mail pay its own way. John Fischer reports that the increase in second class mail rates for magazines and periodicals (127%) is "nothing less than a death sentence for an unpredictable number of publications." Fischer, The Easy Chair, The Atlantic Monthly (June 1973), p. 31. It is not the established giants

carte blanche to design systems of supervision and control nor empower Congress to read the mandate in the First Amendment that "Congress shall make no law . . . abridging the freedom . . . of the press" to mean that Congress may, acting directly or through any of its agencies such as FCC make "some" laws "abridging" freedom of the press.

Powerful arguments, summarized and appraised in Emerson, The System of Freedom of Expression (1970), cc. XVII and XVIII, can be made for revamping or reconditioning the system. The present one may be largely aligned on the side of the status quo. The problem implicates our educational efforts which are bland and conformist and the pressures on the press, from political and from financial sources, to foist boilerplate points of view on our people rather than to display the diversities of ideologies and culture in a world which, as Buckminster Fuller said, has been "communized" by the radio.

What kind of First Amendment would best serve our needs as we approach the 21st century may be an open

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of the publishing field that will suffer most, for it is estimated that some 10,000 magazines and small newspapers will be forced out of existence. *Id.*, at 30. Fischer mentions in specific the National Review, Human Events, The Nation, and The New Republic. These are the publications that offer us the rich diversity of opinion and reporting the First Amendment is designed to promote and protect. As Senator McGee, Chairman of the Post Office and Civil Service Committee, has said: "I believe that the American public generally has a vested interest in the survival of newspapers and magazines. Regardless of the economic, political, or social policies which they espouse, they contribute to the nation's thought process. I am personally convinced that the Congress should not permit magazines to go under because the cost of distributing them through the postal system is higher than their readers are willing to pay." *Id.*, at 32.

In addition to the benefits of reduced postage rates, newspapers have been afforded a limited antitrust exemption. Newspaper Preservation Act, 15 U. S. C. § 1801 *et seq.*

question. But the old fashioned First Amendment that we have is the Court's only guideline; and one hard and fast principle which it announces is that government shall keep its hands off the press. That principle has served us through days of calm and eras of strife and I would abide by it until a new First Amendment is adopted. That means, as I view it, that TV and radio, as well as the more conventional methods for disseminating news, are all included in the concept of "press" as used in the First Amendment and therefore are entitled to live under the laissez faire regime which the First Amendment sanctions.

The issues presented in this case are momentous ones. The TV and radio broadcasters have mined millions by selling merchandise, not in selling ideas across the broad spectrum of the First Amendment. But some newspapers have done precisely that, loading their pages with advertisements; they publish, not discussions of critical issues confronting our society, but stories about murders, scandal, and slanderous matter touching the lives of public servants who have no recourse due to *New York Times Co.* v. *Sullivan*, 376 U. S. 254. Commissioner Johnson of the FCC wrote in the present case a powerful dissent. He said:

> "Although the First Amendment would clearly ban governmental censorship of speech content, government must be concerned about the procedural rules that control the public forums for discussions. If someone—a moderator, or radio-television licensee—applies rules that give one speaker, or viewpoint, less time [or none at all] to present a position, then a censorship exists as invidious as outright thought control. There is little doubt in my mind that for any given forum of speech the First Amendment *demands* rules permitting as many to speak and be

> heard as possible. And if this Commission does not enact them, then the courts must require them."

But the prospect of putting government in a position of control over publishers is to me an appalling one, even to the extent of the Fairness Doctrine. The struggle for liberty has been a struggle against government. The essential scheme of our Constitution and Bill of Rights was to take government off the backs of people. Separation of powers was one device. An independent judiciary was another device. The Bill of Rights was still another. And it is anathema to the First Amendment to allow government any role of censorship over newspapers, magazines, books, art, music, TV, radio or any other aspect of the press. There is unhappiness in some circles at the impotence of government. But if there is to be a change, let it come by constitutional amendment. The Commission has an important role to play in curbing monopolistic practices, in keeping channels free from interference, in opening up new channels as technology develops. But it has no power of censorship.

It is said, of course, that government can control the broadcasters because their channels are in the public domain in the sense that they use the airspace that is the common heritage of all the people. But parks are also in the public domain. Yet people who speak there do not come under government censorship. *Lovell* v. *Griffin*, 303 U. S. 444, 450–453; *Hague* v. *CIO*, 307 U. S. 496, 515–516. It is the tradition of Hyde Park, not the tradition of the censor, that is reflected in the First Amendment. TV and radio broadcasters are a vital part of the press; and since the First Amendment allows no government control over it, I would leave this segment of the press to its devices.

Licenses are, of course, restricted in time and while, in my view, Congress has the power to make each license limited to a fixed term and nonreviewable, there is no

power to deny renewals for editorial or ideological reasons. The reason is that the First Amendment gives no preference to one school of thought over the others.[11]

The Court in today's decision by endorsing the Fairness Doctrine sanctions a federal saddle on broadcast licensees that is agreeable to the traditions of nations that never have known freedom of press[12] and that is tolerable in countries that do not have a written constitution containing prohibitions as absolute as those in the First Amendment. Indeed after this case was argued the FCC instituted a "non-public" inquiry[13] to determine whether any broadcaster or cablecaster has

[11] Judge Bazelon, dissenting in *Brandywine-Maine Line Radio, Inc.* v. *Federal Communications Commission*, 473 F. 2d 16, 69–70, said: "WXUR was no doubt devoted to a particular religious and political philosophy; but it was also a radio station devoted to speaking out and stirring debate on controversial issues. The station was purchased by Faith Theological Seminary to propagate a viewpoint which was not being heard in the greater Philadelphia area. The record is clear that through its interview and call-in shows it *did* offer a variety of opinions on a broad range of public issues; and that it never refused to lend its broadcast facilities to spokesmen of conflicting viewpoints.

"The Commission's strict rendering of fairness requirements, as developed in its decision, has removed WXUR from the air. This has deprived the listening public not only of a viewpoint but also of robust debate on innumerable controversial issues. It is beyond dispute that the public has *lost* access to information and ideas. This is not a loss to be taken lightly, however unpopular or disruptive we might judge these ideas to be." (Footnotes omitted.)

[12] If Eastern European experience since World War II is any criterion, the newspapers are pretty much the company paper in the huge company (communist) nation. The easiest target, however, seems to be TV where the input can be carefully controlled and "prime time" filled with tapes of official meetings, political speeches, and the tedious accounts of achievement of the workers. See Morgan, Press Obedience in East Europe, Wash. Post, May 19, 1973, OPED.

[13] FCC Order No. 73–331, 39 Fed. Reg. 8301 (March 27, 1973).

broadcast " 'obscene, indecent or profane material' in violation of" 18 U. S. C. § 1464.

In April 1973, FCC fined Sonderling Broadcasting Corp. that operates station WGLD in Oak Park, Illinois, for allowing "obscene" conversations on a telephone "talk show." It used *Roth* v. *United States*, 354 U. S. 476, *Memoirs* v. *Massachusetts*, 383 U. S. 413, and *Ginzburg* v. *United States*, 383 U. S. 463, as supplying the criteria for broadcasting. It fined the corporation $2,000 under 18 U. S. C. § 1464 which reads, "whoever utters any obscene indecent or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." — F. C. C. —.

Commissioner Johnson dissented, saying that the FCC prefers "to sit as an omniscent programming review board, allegedly capable of deciding what is and is not good for the American public to see and hear"; and that when the FCC bars a particular program it casts "a pall over the entire broadcasting industry" for the reason that the licensees "fear the potential loss of their highly profitable broadcast licenses." That he concluded creates a "chilling effect" which has "enormous proportions" and reaches "all forms of broadcast expression." *Id.*, at —.

We ourselves have, of course, made great inroads on the First Amendment of which obscenity is only one of the many examples. So perhaps we are inching slowly toward a controlled press. But the regime of federal supervision under the Fairness Doctrine is contrary to our constitutional mandate and makes the broadcast licensees an easy victim of political pressures and reduces him to a timid and submissive segment of the press whose measure of the public interest will now be echoes of the dominant political voice that emerges after every election. The affair with freedom of which we have been

proud will now bear only a faint likeness of our former robust days.

III

I said that it would come as a surprise to the public as well as to publishers and editors of newspapers to learn that they were under a newly created federal bureau. Perhaps I should have said that such an event *should* come as a surprise. In fact it might not in view of the retrogressive steps we have witnessed.

We have allowed ominous inroads to be made on the historic freedom of the newspapers. The effort to suppress the publication of the Pentagon Papers failed only by a narrow margin and actually succeeded for a brief spell in imposing prior restraint on our press for the first time in our history. See *New York Times* v. *United States*, 403 U. S. 713.

In recent years the admonition of Mr. Justice Black that the First Amendment gave the press freedom so that it might "serve the governed, not the governors" (*id.*, at 717) has been disregarded.

"The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell." *Ibid.*

The right of the people to know has been greatly undermined by our decisions requiring under pain of contempt a reporter to disclose the sources of the information he comes across in investigative reporting. *Branzburg* v. *Hayes*, 408 U. S. 665.

The Boston Globe reports: [14]

> "In the last two years at least 20 Federal Grand Juries have been used to investigate radical or anti-war dissent. With the power of subpoena, the proceedings secret, and not bound by the rules of evidence required in open court, they have a lot more leverage than, for example, the old House Un-American Activities Committee."

Many reporters have been put in jail, a powerful weapon against investigative reporting. As the Boston Globe states "in realizing what is being undermined here is press freedom itself." [15]

In the same direction is the easy use of the stamp "secret" or "top secret" which the Court recently approved in *Environmental Protection Agency* v. *Mink*, 409 U. S. —. That decision makes a shambles of the Freedom of Information Act. In tune with the other restraints on the press are provisions of the new proposed Rules of Evidence which the Court recently sent to Congress. Proposed Rule 509 (a)(2)(b) provides:

> "The government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state or official information, as defined in this rule."

Under the statute if Congress does not act,[16] this new regime of secrecy is imposed on the Nation and the right

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[14] The Peoples need to Know, an Editorial Series, Boston Globe, January 21–27, 1973.

[15] *Ibid.*

[16] By reason of an Act of Congress of March 30, 1973, the Rules of Evidence—and amendments to the Rules of Civil Procedure and to the Rule of Criminal Procedure (which we sent up Nov. 20, 1972 and Dec. 18, 1972) will have no force or effect except to the extent that Congress expressly approves. 87 Stat. 9.

of people to know is further curtailed. The proposed code sedulously protects the Government; it does not protect newsmen. It indeed pointedly omits any mention of the privilege of newsmen to protect their confidential sources.

These growing restraints on newspapers have the same ominous message that the overtones of the present opinion has on TV and radio licensees.

The growing spectre of governmental control and surveillance over all activities of people makes ominous the threat to liberty by those who hold the executive power. Over and again attempts have been made to use the Commission as a political weapon against the opposition, whether to the left or to the right.

Experience has shown that unrestrained power cannot be trusted to serve the public weal even though it be in governmental hands. The fate of the First Amendment should not be so jeopardized.[17] The constitutional mandate that the government shall make "no law" abridging freedom of speech and the press is clear; the orders and rulings of the Commission are covered by that ban; and it must be carefully confined lest broadcasting—now our most powerful media—be used to subdue the minorities or help produce a Nation of people who walk submissively to the executive's notions of the public good.

Mills v. *Alabama*, 384 U. S. 214, involved a prosecution of a newspaper editor for publishing, contrary to a state

[17] Alexander Bickel has spurned the "total agnosticism" that allows the First Amendment to have its way because "who really knows, after all, what is true or false, evil or good, noxious or wholesome." Bickel, The Press and Government: Adversaries Without Absolutes, Freedom at Issue (May-June 1973), p. 5. He attributes this view to Justice Holmes. He would place at least partial responsibility with the government for determining the "good counsels and wholesome doctrine." *Ibid.* But, it was precisely the mistrust of the evanscent, narrow, factional views of those in power and the belief that no one has a patent on the "truth" that underly the First Amendment.

statute, an editorial on election day urging the voters to vote against the existing city commission and to replace it with a mayor-council government. This Court, speaking through Mr. Justice Black, reversed the judgment saying:

> ". . . the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free. The Alabama Corrupt Practices Act by providing criminal penalties for publishing editorials such as the one here silences the press at a time when it can be most effective. It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press." *Id.*, at 219.

I would apply the same test to TV or radio.[18]

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[18] The monetary and other burdens imposed on the press by the right of a criticized person to reply, like the traditional damage remedy for libel, lead of course to self-censorship respecting matters of importance to the public that the First Amendment denies the Government the power to impose. The burdens certainly are as onerous as the indirect restrictions on First Amendment rights which we have struck down: (1) the requirement that a bookseller examine the contents of his shop; *Smith* v. *California*, 361 U. S. 147 (1959); (2) the requirement that a magazine publisher investigate his advertisers, *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478, 492–493 (1962) (opinion of Harlan, J.); (3) the requirement that names and addresses of sponsors be printed on handbills, *Talley* v. *California*, 362 U. S. 60 (1960); (4) the requirement that organizations supply membership lists, *Gibson* v. *Florida Legislative Investigation*

What Walter Lippman wrote about Coolidge's criticism of the press has present relevancy. President Coolidge, he said, had

> "declared for peace, goodwill, understanding, moderation; disapproved of conquest, aggression, exploitation; pleaded for a patriotic press, for a free press; denounced a narrow and bigoted nationalism, and announced that he stood for law, order, protection of life, property, respect for sovereignty and principle of international law. Mr. Coolidge's catalog of the virtues was complete except for one virtue. . . .
>
> "That is the humble realization that God has not endowed Calvin Coolidge with an infallible power to determine in each concrete case exactly what is right, what is just, what is patriotic. . . . Did he recognize this possibility, he would not continue to lecture the press in such a way to make it appear that when newspapers oppose him they are unpatriotic, and that when they support him they do so not because they think his case is good but because they blindly support him. Mr. Coolidge's notion . . . would if it were accepted by the American press reduce it to utter triviality." Luskin, Lippman, Liberty, and the Press, p. 60 (1972).

The same political appetite for oversight of most segments of the press has markedly increased since the bland days of Calvin Coolidge.

Committee, 372 U. S. 539 (1963); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293 (1961); *Bates* v. *City of Little Rock*, 361 U. S. 516 (1960); *NAACP* v. *Alabama*, 357 U. S. 449 (1958); and (5) the requirement that individuals disclose organizational members, *Shelton* v. *Tucker*, 364 U. S. 479 (1960). In each instance we held the restriction unconstitutional on the ground that it discouraged or chilled constitutionally protected rights of speech, press or association.

SUPREME COURT OF THE UNITED STATES

Nos. 71–863, 71–864, 71–865, AND 71–866

Columbia Broadcasting System, Inc., Petitioner,
71–863 *v.*
Democratic National Committee.

Federal Communications Commission et al., Petitioners,
71–864 *v.*
Business Executives' Move for Vietnam Peace et al.

Post-Newsweek Stations, Capital Area, Inc., Petitioner,
71–865 *v.*
Business Executives' Move for Vietnam Peace.

American Broadcasting Companies, Inc., Petitioner,
71–866 *v.*
Democratic National Committee.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissenting.

These cases require us to consider whether radio and television broadcast licensees may, with the approval of the Federal Communications Commission,[1] refuse *abso-*

[1] See *Business Executives Move for Vietnam Peace*, 25 F. C. C. 2d 242 (1970); *Democratic National Committee*, 25 F. C. C. 2d 216 (1970).

lutely to sell any part of their advertising time to groups or individuals wishing to speak out on controversial issues of public importance. In practical effect, the broadcaster policy here under attack permits airing of only those paid presentations which advertise products or deal with "non-controversial" matters, while relegating the discussion of controversial public issues to formats such as documentaries, the news, or panel shows, which are tightly controlled and edited by the broadcaster. The Court holds today that this policy—including the *absolute* ban on the sale of airtime for the discussion of controversial issures—is consistent with the "public interest" requirements of the Communications Act of 1934, 47 U. S. C. §§ 307 (d), 309 (a).[2] The Court also holds that the

[2] I do not *specifically* address the "statutory" question in this case because, in practical effect, the considerations underlying the "statutory" question are in many respects similar to those relevant to the "substance" of the "constitutional" claim. There is one aspect of the Court's "statutory" discussion, however, that merits at least brief attention. In upholding the absolute ban on the sale of editorial advertising, the Court relies heavily upon 47 U. S. C. § 153 (h), which declares that broadcasters shall not be deemed "common carriers." In my view, this reliance is misplaced. Even a cursory examination of the legislative history of this provision reveals that it was enacted in recognition of the fact that traditional doctrines governing true "common carriers," such as transportation companies, would not suit the particular problems of radio broadcasting. Specifically, it was feared that such "common carrier" status for broadcasters would mean that they "would have to give *all* their time to [public issues]." 67 Cong. Rec. 12504 (Sen. Dill) (emphasis added); see also *ibid.* (Sen. Broussard); *id.*, at 12356 (Sen. Fess). Section 153 (h) was intended solely to assure that broadcasters would not be required to surrender *all* of their airtime to willing purchasers; it does not bear upon the question whether they may be required to sell a *reasonable and limited* amount of airtime to members of the public for discussion of controversial issues. See 2 Z. Chafee, Government and Mass

challenged policy does not violate the First Amendment. It is noteworthy that, in reaching this result, the Court does *not* hold that there is insufficient "governmental involvement" in the promulgation and enforcement of the challenged ban to activate the commands of the First Amendment. On the contrary, only THE CHIEF JUSTICE, and my Brothers STEWART and REHNQUIST express the view that the First Amendment is inapplicable to this case. My Brothers WHITE, BLACKMUN, and POWELL quite properly do not decide that question, for they find that the broadcaster policy here under attack does not violate the "substance" of the First Amendment. Similarly, there is no Court for the *holding* that the challenged ban does not violate the "substance" of the First Amendment. For although THE CHIEF JUSTICE, and my Brother REHNQUIST purport to "decide" that question, their disposition of the "governmental involvement" issue necessarily renders their subsequent discussion of the "substantive" question mere *dictum*.

In my view, the principle at stake here is one of fundamental importance, for it concerns the people's right to engage in and to hear vigorous public debate on the broadcast media. And balancing what I perceive to be the competing interests of broadcasters, the listening and viewing public, and individuals seeking to express their views over the electronic media, I can only conclude that the exclusionary policy upheld today can

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Communications 635 n. 75 (1947). Indeed, the Commission has itself rejected the Court's interpretation of § 153 (h) when it declared, over 25 years ago, that "the operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues . . . is inconsistent with the concept of public interest established by the Communications Act. . . ." *United Broadcasting Co.*, 10 F. C. C. 515, 518 (1945).

serve only to inhibit, rather than to further, our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964). I would therefore affirm the determination of the Court of Appeals that the challenged broadcaster policy is violative of the First Amendment.

I

The command of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press" is, on its face, directed at governmental rather than private action. Nevertheless, our prior decisions make clear that "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon [governmental] action." *Evans* v. *Newton*, 382 U. S. 296, 299 (1966). Thus, the reach of the First Amendment depends not upon any formalistic "private-public" dichotomy but, rather, upon more functional considerations concerning the extent of governmental involvement in, and public character of, a particular "private" enterprise. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the [Government] in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1961); see *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 172 (1972). And because of the inherent complexity of this case-by-case inquiry, "[t]his Court has never attempted the 'impossible task' of formulating an infallible test" for determining in all instances whether particular conduct must be deemed private or governmental. *Reitman* v. *Mulkey*, 387 U. S. 369, 378 (1967); see *Kotch* v. *Pilot Comm'rs*, 330 U. S. 552, 556 (1947).

This does not mean, of course, that our prior experience in this area offers no guidance for the purposes of our present inquiry. On the contrary, our previous decisions have focused on myriad indicia of "governmental action," many of which are directly applicable to the operations of the broadcast industry.[3] As the Court of Appeals recognized, "the general characteristics of the broadcast industry reveal an extraordinary relationship between the broadcasters and the federal government—a relationship which puts that industry in a class with few others." 450 F. 2d, at 651. More specifically, the public nature of the airwaves, the governmentally created preferred status of broadcast licensees, the pervasive federal regulation of broadcast programming, and the Commission's specific approval of the challenged broadcaster policy combine in this case to bring the promulgation and enforcement of that policy within the orbit of constitutional imperatives.

At the outset, it should be noted that both radio and television broadcasting utilize a natural resource—the electromagnetic spectrum[4]—that is part of the public domain. And although broadcasters are granted the temporary use of this valuable resource for terminable three-year periods, "ownership" and ultimate control remain vested in the people of the United States. Thus, § 301 of the Communications Act of 1934, 47 U. S. C. § 301, specifically provides:

> "It is the purpose of this [Act] . . . to maintain the control of the United States over all channels of

[3] See generally *Business Executives Move for Vietnam Peace*, 25 F. C. C. 2d 242, 253–264 (1970) (dissenting opinion), wherein Commissioner Johnson identified no less than eight separate indicia of "governmental action" involved in the promulgation and enforcement of the challenged broadcaster policy.

[4] For a discussion of the attributes of the electromagnetic spectrum, see generally W. Jones, Regulated Industries 1019 (1967); Levin, The Radio Spectrum Resource, 11 J. Law & Econ. 433 (1968).

> interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the licensee. . . ."

Such public "ownership" of an essential element in the operations of a private enterprise is, of course, an important and established indicium of "governmental involvement." In *Burton* v. *Wilmington Parking Authority, supra,* for example, we emphasized the fact of "public ownership" in holding the proscriptions of the Fourteenth Amendment applicable to a privately owned restaurant leasing space in a building owned by the State.[5] In reaching this result, we explained that, in part because of the "public ownership" of the building, the State "has elected to place its power, property and prestige behind the" actions of the privately owned restaurant. 365 U. S., at 725. And viewing the relationship in its entirety, we concluded that "[t]he State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recog-

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[5] It is true, of course, that unlike the State in *Burton*, the Federal Government here does not receive substantial financial compensation for the use of the "public" property. See *Burton* v. *Wilmington Parking Authority, supra,* at 723–724; *Moose Lodge No. 107* v. *Irvis, supra,* at 174–175. Nevertheless, the absence of such a financial arrangement represents, in practical effect, government subsidization of broadcasters, thereby enhancing the degree of governmental involvement. Cf. Kalven, Broadcasting, Public Policy and the First Amendment, 10 J. Law & Econ. 15, 31 (1967). Moreover, as in *Burton*, the publicly owned property is "not surplus state property" but, rather, constitutes an "integral and, indeed, indispensable part" of the governmental scheme. *Burton* v. *Wilmington Parking Authority, supra,* at 723. See also 47 U. S. C. § 303 (g).

nized as a joint participant in the challenged activity. . . ." *Ibid.*; see also *Moose Lodge No. 107* v. *Irvis, supra*, at 172–173, 175; *Turner* v. *City of Memphis*, 369 U. S. 350 (1962); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (SDNY 1967); *Farmer* v. *Moses*, 232 F. Supp. 154 (SDNY 1964).

A second indicium of "governmental involvement" derives from the direct dependence of broadcasters upon the Federal Government for their "right" to operate broadcast frequencies. There can be no doubt that, for the industry as a whole, governmental regulation alone makes "radio communication possible by . . . limiting the number of licenses so as not to overcrowd the spectrum." *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 389 (1969).[6] Moreover, with respect to individual licensees, it is equally clear that "existing broadcasters have often attained their present position," not as a result of free market pressures[7] but, rather, "because of their initial government selection. . . ." *Id.*, at 400. Indeed, the "quasi-monopolistic" advantages enjoyed by broadcast licensees "are the fruit of a preferred position conferred by the Government." *Ibid.* Thus, as CHIEF JUSTICE (then Judge) BURGER has himself recognized, "[a] broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." *Office of Communication of the United Church of Christ* v. *FCC*, 123 U. S. App. D. C. 328, 337, 359 F. 2d 994, 1003 (1966). And, along these same lines, we have consistently held

[6] For a discussion of the Fairness Doctrine and its relevance to this case, see text and notes, at nn. 15–34, *infra*.

[7] Indeed, the Communications Act of 1934 makes it a criminal offense to operate a broadcast transmitter without a license. See 47 U. S. C. § 501. Thus, the Federal Government specifically insulates the licensee from any real threat of economic competition.

that "when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself." *American Communications Assn.* v. *Douds*, 339 U. S. 382, 401 (1950); see, *e. g., Public Utilities Commission* v. *Pollak*, 343 U. S. 451, 462 n. 8 (1952).

A further indicium of "governmental involvement" in the promulgation and enforcement of the challenged broadcaster policy may be seen in the extensive governmental control over the broadcast industry. It is true, of course, that this "Court has never held" that actions of an otherwise private entity necessarily constitute governmental action if that entity "is subject to . . . regulation in any degree whatever." *Moose Lodge No. 107* v. *Irvis*, *supra*, at 173. Here, however, we are confronted not with some minimal degree of regulation but rather, with an elaborate statutory scheme governing virtually all aspects of the broadcast industry.[8] Indeed, federal agency review and guidance of broadcaster conduct is

[8] Thus, the Communications Act of 1934 authorizes the Federal Communications Commission to assign frequency bands, 47 U. S. C. § 303 (c); allocate licenses by location, § 303 (d); regulate apparatus, § 303 (e); establish service areas, § 303 (h); regulate chain ownership, § 303 (i); require the keeping of detailed records, § 303 (j); establish qualifications of licensees, § 303 (l); suspend licenses, § 303 (m)(one); inspect station facilities, § 303 (n); require publication of call letters and other information, § 303 (p); make rules to effect regulation of radio and television, § 303 (r); require that television sets be capable of receiving all signals, § 303 (s); regulate the granting of licenses and the terms thereof, §§ 307, 309; prescribe information to be supplied by applicants for licenses, § 308 (b); regulate the transfer of licenses, § 310; impose sanctions on licensees, including revocation of license, § 312; require fair coverage of controversial issues, § 315; control the operation of transmitting apparatus, § 318; and prohibit the use of offensive language, § 326.

automatic, continuing and pervasive.[9] Thus, as the Court of Appeals noted, "[a]lmost no other private business—almost no other regulated private business—is so intimately bound to government. . . ." 450 F. 2d, at 652.

Even more important than this general regulatory scheme, however is the *specific* governmental involvement in the boradcaster policy presently under consideration. There is, for example, an obvious nexus between the Commission's Fairness Doctrine and the absolute refusal of broadcast licensees to sell any part of their airtime to groups or individuals wishing to speak out on controversial issues of public importance. Indeed, in defense of this policy, the broadcaster-petitioners argue vigorously that this exclusionary policy is authorized and even compelled by the Fairness Doctrine. And the Court itself recognizes repeatedly that the Fairness Doctrine and other Communications Act policies are inextricably linked to the challenged ban. Thus, at one point, the Court suggests that "[i]f the Fairness Doctrine were applied to editorial advertising, there is . . . the substantial danger that the effective operation of that doctrine would be jeopardized." *Ante*, at —. Similarly, the Court maintains that, in light of the Fairness

[9] Pursuant to statutory authority, see n. 8, *supra*, the Commission has promulgated myriad regulations governing all aspects of licensee conduct. See 47 CFR § 73.17 *et seq.* These regulations affect such matters as hours of operation, § 73.23; multiple ownership of licenses by a single individual, § 73.35; station location and program origination, § 73.30; maintenance of detailed logs of programming, operation, and maintenance, §§ 73.111–116; billing practices, § 73.124; the personal attack and political editorial fairness requirements, § 73–123; relationship of licensees to networks, §§ 73.131–139; permissible equipment, §§ 73.39–50. The above-cited regulations relate only to AM radio, but similar regulations exist for FM radio, § 73.201 *et seq.*, and television, § 73.601 *et seq.*

Doctrine, there simply is no reason to allow individuals to purchase advertising time for the expression of their own views on public issues. See *ante*, at —.[10] Although I do not in any sense agree with the substance of these propositions, they serve at least to illustrate the extent to which the Commission's Fairness Doctrine has influenced the development of the policy here under review.

Moreover, the Commission's involvement in the challenged policy is not limited solely to the indirect effects of its Fairness Doctrine. On the contrary, in a decision which must inevitably provide guidance for future broadcaster action, the Commission has specifically considered and specifically authorized the flat ban. See *Business Executives Move for Vietnam Peace*, 25 F. C. C. 2d 242 (1970); *Democratic National Committee*, 25 F. C. C. 2d 216 (1970). In so doing, the Commission—and through it the Federal Government—has unequivocably given its imprimatur to the absolute ban on editorial advertising. And, of course, it is now well-settled that specific governmental approval of or acquiesence in challenged action by a private entity indicates "governmental action."

Thus, in *McCabe* v. *Atchison, Topeka & Santa Fe R. Co.*, 235 U. S. 151 (1914), for example, the Court dealt with a statute which, as construed by the Court, simply *authorized* rail carriers to provide certain types of cars for white passengers without offering equal facilities to blacks. Although dismissal of the complaint on procedural grounds was affirmed, we made clear that such a statute, even though purely permissive in nature, was invalid under the Fourteenth Amendment because a carrier refusing equal service to blacks would be "acting in

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[10] In addition, the Court contends that, because of the Fairness Doctrine, the challenged broadcaster policy does not discriminate against controversial speech. See *ante*, at —.

the matter under the authority of a state law." *Id.*, at 162. And, some 50 years later, we explained this finding of "governmental action" in *McCabe* as "nothing less than considering a permissive state statute as an authorization to discriminate and as sufficient state action to violate the Fourteenth Amendment. . . ." *Reitman* v. *Mulkey*, 387 U. S. 369, 379 (1967). Thus, "[o]ur prior decisions leave no doubt" that any action of the Government, through any of its agencies, approving, authorizing, encouraging or otherwise supporting conduct which if performed by the Government would violate the Constitution, "constitutes illegal [governmental] involvement in those pertinent private acts . . . that subsequently occur." *Adickes* v. *Kress & Co.*, 398 U. S. 144, 202 (1970) (separate opinion); see, *e. g.*, *Moose Lodge No. 107* v. *Irvis*, *supra*; *Hunter* v. *Erickson*, 393 U. S. 385 (1969); *Reitman* v. *Mulkey*, *supra*; *Evans* v. *Newton*, *supra*, *Robinson* v. *Florida*, 378 U. S. 153 (1964); *Lombard* v. *Louisiana*, 373 U. S. 267 (1963); *Peterson* v. *City of Greenville*, 373 U. S. 244 (1963); *Burton* v. *Wilmington Parking Authority*, *supra*; *McCabe* v. *Atchison, Topeka & Santa Fe R. Co.*, *supra*.

Finally, and perhaps most important, in a case virtually identical to the one now before us, we held that a policy promulgated by a privately owned bus company, franchised by the Federal Government and regulated by the Public Utilities Commission of the District of Columbia, must be subjected to the constraints of the First Amendment. *Public Utilities Commission* v. *Pollak*, 343 U. S. 451 (1952). In reaching that result, we placed primary emphasis on the specific regulatory acquiescence in the challenged action of the bus company. Thus, after noting that the bus company "operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress," we explained that

our finding of "governmental action" was predicated specifically

> "upon the fact that that agency, pursuant to protests against the [challenged policy], ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby." 343 U. S., at 462.

See *Moose Lodge No. 107* v. *Irvis*, *supra*, at 175–176 n. 3.

Although THE CHIEF JUSTICE, joined by MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST, strains valiantly to distinguish *Pollak*, he offers nothing more than the proverbial "distinctions without a difference." Here, as in *Pollak*, the broadcast licensees operate "under the regulatory supervision of . . . an agency authorized by Congress." And, again as in *Pollak*, that agency received "protests" against the challenged policy and, after formal consideration, "dismissed" the complaints on the ground that the "public interest, convenience, and necessity" were not "impaired" by that policy. Indeed, the argument for finding "governmental action" here is even stronger than in *Pollak*, for this case concerns not an incidental activity of a bus company but, rather, the primary activity of the regulated entities—communication.

Thus, given the confluence of these various indicia of "governmental action"—including the public nature of the airwaves,[11] the governmentally created preferred

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[11] Moreover, the appropriateness of a particular forum, even if privately owned, for effective communication has in some instances been emphasized to establish the relevance of First Amendment protections. See, *e. g.*, *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 (1968); *Marsh* v. *Alabama*, 326 U. S. 501 (1946). Here, as the Court of Appeals recognized,

status of broadcasters, the extensive Government regulation of broadcast programming, and the specific governmental approval of the challenged policy—I can only conclude that the Government "has so far insinuated itself into a position" of participation in this policy that the absolute refusal of broadcast licensees to sell airtime to groups or individuals wishing to speak out on controversial issues of public importance must be subjected to the restraints of the First Amendment.[12]

"the broadcast media are specifically dedicated to communication. They function as both our foremost forum for public speech and our most important educator of an informed people." 450 F. 2d, at 653. See also text and notes, at nn. 35–37, *infra*.

[12] In his separate concurring opinion, my Brother STEWART suggests that a finding of governmental action in this context necessarily means that "private broadcasters *are* Government." *Ante*, at —— (emphasis in original). In my view, this assertion reflects a complete misunderstanding of the nature of the governmental involvement in this case. Here, the Government has selected the persons who will be permitted to operate a broadcast station, extensively regulates those broadcasters, and has specifically approved the challenged broadcaster policy. Thus, the commands of the First Amendment come into play, not because "private broadcasters *are* Government," but, rather, because the Government "has so far insinuated itself into a position" of participation in the challenged policy as to make the Government itself responsible for its effects. Similarly, I cannot agree with my Brother STEWART's suggestion that a finding of governmental involvement in this case "would simply strip broadcasters of their own First Amendment rights." *Ante*, at ——. The actions of a purely private individual are, of course, not subject to the constraints of the First Amendment. But where, as here, the Government has implicated itself in the actions of an otherwise private individual, that individual must exercise his own rights with due regard for the First Amendment rights of others. In other words, an accommodation of competing rights is required, and "balancing," not the "absolutist" approach suggested by my Brother STEWART, is the result. Indeed, it is this misunderstanding of the significance of governmental involvement that apparently leads to my Brother STEWART's disagreement with my Brothers WHITE,

II

Radio and television have long been recognized as forms of communication "affected by a First Amendment interest" and, indeed, it can hardly be doubted that broadcast licensees are themselves protected by that Amendment. *Red Lion Broadcasting Co.* v. *FCC, supra,* at 386. See *United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131, 166 (1948); Z. Chafee, Free Speech in the United States 545–546 (1941). Recognition of this fact does not end our inquiry, however, for it is equally clear that the protection of the First Amendment in this context is not limited solely to broadcasters. On the contrary, at least one set of competing claims to the protection of that Amendment derives from the fact that, because of the limited number of broadcast frequencies available and the potentially pervasive impact of the electronic media, "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends

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BLACKMUN, and POWELL as to the relationship between the "public interest" standard of the Act and First Amendment "values."

I might also note that, contrary to the suggestion of my Brother STEWART, a finding of governmental involvement in this case does not in any sense command a similar conclusion with respect to newspapers. Indeed, the factors that compel the conclusion that the Government is involved in the promulgation and enforcement of the challenged broadcaster policy have simply no relevance to newspapers. The decision as to who shall operate newspapers is made in the free market, not by Government fiat. The newspaper industry is not extensively regulated and, indeed, in light of the differences between the electronic and printed media, such regulation would violate the First Amendment with respect to newspapers. Finally, since such regulation of newspapers would be impossible, it would likewise be impossible for the Government to approve an exclusionary policy of newspapers in the sense that it has approved the challenged policy of the broadcasters.

and purposes of the First Amendment." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, at 390.

Over 50 years ago, Mr. Justice Holmes sounded what has since become a dominant theme in applying the First Amendment to the changing problems of our Nation. "[T]he ultimate good," he declared, "is better reached by free trade in ideas," and "the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (dissenting opinion); see also *Whitney* v. *California*, 274 U. S. 357, 375–376 (1927) (Brandeis, J., concurring); *Gitlow* v. *New York*, 268 U. S. 652, 672–673 (1925) (Holmes, J., dissenting). Indeed, the First Amendment itself testifies to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," [13] and the Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ." *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945). For "it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected." *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949); see also *Thornhill* v. *Alabama*, 310 U. S. 88, 102 (1940); *Palko* v. *Connecticut*, 302 U. S. 319, 326–327 (1937).

With considerations such as these in mind, we have specifically declared that, in the context of radio and television broadcasting, the First Amendment protects "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences. . . ." *Red Lion Broadcasting Co.* v. *FCC*,

[13] *New York Times Co.* v. *Sullivan*, *supra*, at 270; see also *Pickering* v. *Board of Education*, 391 U. S. 563, 573 (1968); *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966).

supra, at 390.[14] And, because "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee," "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Ibid.*

Thus, we have explicitly recognized that, in light of the unique nature of the electronic media, the public have strong First Amendment interests in the reception of a full spectrum of views—presented in a vigorous and uninhibited manner—on controversial issues of public importance. And, as we have seen, it has traditionally been thought that the most effective way to insure this "uninhibited, robust, and wide-open" debate is by fostering a "free trade in ideas" by making our forums of communication readily available to all persons wishing to express their views. Although apparently conceding the legitimacy of these principles, the Court nevertheless upholds the absolute ban on editorial advertising because, in its view, the Commission's Fairness Doctrine, in and of itself, is sufficient to satisfy the First Amendment interests of the public. I cannot agree.

The Fairness Doctrine originated early in the history of broadcast regulation and, rather than being set forth in any specific statutory provision,[15] developed gradually

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[14] This was not new doctrine, for we have long recognized in a variety of contexts that the First Amendment "necessarily protects the right to receive [information]." *Martin* v. *City of Struthers*, 319 U. S. 141, 143 (1943); see, *e. g.*, *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969); *Time, Inc.* v. *Hill*, 385 U. S. 374, 388 (1967); *Griswold* v. *Connecticut*, 381 U. S. 479, 482 (1965); *Lamont* v. *Postmaster General*, 381 U. S. 301 (1965).

[15] The Fairness Doctrine was recognized and implicitly approved by Congress in the 1959 amendments to § 315 of the Communications Act. Act of September 14, 1959, § 1, 73 Stat. 557, amending

in a long series of Commission rulings in particular cases.[16] In essence, the doctrine imposes a two-fold duty upon broadcast licensees: (1) coverage of issues of public importance must be adequate,[17] and (2) such coverage must fairly reflect opposing viewpoints.[18] See *Red Lion Broadcasting Co.* v. *FCC*, *supra*, at 377. In fulfilling their obligations under the Fairness Doctrine, however, broadcast licensees have virtually complete discretion, subject only to the Commission's general requirement that licensees act "reasonably and in good faith," [19]

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47 U. S. C. § 315 (a). As amended, § 315 (a) recognizes the obligation of broadcasters "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

[16] The Fairness Doctrine was first fully set forth in Report in the Matter of Editorializing by Broadcast Licensees, 13 F. C. C. 1246 (1949), and was elaborated upon in Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964). The statutory authority of the Commission to promulgate this doctrine and related regulations derives from the mandate to the "Commission from time to time, as public convenience, interest, or necessity requires," to promulgate "such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of [the Act]. . . ." 47 U. S. C. §§ 303, 303 (r).

[17] See *John J. Dempsey*, 6 P & F Radio Reg. 615 (1950); see also *Metropolitan Broadcasting Corp.*, 19 P & F Radio Reg. 602 (1960); *The Evening News Association*, 6 P & F Radio Reg. 283 (1950).

[18] If the broadcaster presents one side of a question, and does not wish to present the other side himself, he can fulfill his fairness obligation by announcing his willingness to broadcast opposing views by volunteers. See *Mid-Florida Television Corp.*, 40 F. C. C. 620 (1964). If the broadcaster rejects a volunteer spokesman as "inappropriate," he must seek out others. See *Richard G. Ruff*, 19 F. C. C. 2d 838 (1969). The broadcaster must provide free time for the presentation of opposing views if sponsorship is unavailable. See *Cullman Broadcasting Co.*, 25 P & F Radio Reg. 895 (1963).

[19] Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, *supra*, n. 16, at 10424.

"to determine what issues should be covered, how much time should be allocated, which spokesmen should appear, and in what format." [20] Thus, the Fairness Doctrine does not in any sense require broadcasters to allow "non-broadcaster" speakers to use the airwaves to express their own views on controversial issues of public importance.[21] On the contrary, broadcasters may meet their fairness responsibilities through presentation of carefully edited news programs, panel discussions, interviews, and documentaries. As a result, broadcasters retain almost exclusive control over the selection of issues and viewpoints to be covered, the manner of presentation and,

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[20] *Notice of Inquiry: The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 30 F. C. C. 2d 26, 28 (1971); see also Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, *supra*, n. 16, at 10416; Report in the Matter of Editorializing by Broadcast Licensees, *supra*, n. 16.

[21] Thus, the Fairness Doctrine must be sharply distinguished from the "equal time" requirement, which provides that a broadcaster who affords airtime to one political candidate must make equal time available to other candidates for the same office. 47 U. S. C. § 315. See also *Nicholas Zapple*, 23 F. C. C. 2d 707 (1970) (extension of "equal time" rule to cover a candidate's supporters where spokesmen for other candidates are permitted to purchase airtime). Similarly, the Fairness Doctrine must not be confused with the Commission's "personal attack" and "political editorializing" rules which were upheld in *Red Lion Broadcasting Co.* v. *FCC*, *supra*. The "personal attack" rule provides that "when, during the presentation of views on a controversial issue of public importance, an attack is made on the honesty, character, integrity, or like personal qualities of an identified person," the licensee must notify the person attacked and offer him an opportunity to respond. 47 CFR § 73.123. The "political editorializing" rule provides that when a licensee endorses a candidate for political office it must give other candidates or their spokesmen an opportunity to respond. See, *e. g.*, 47 CFR § 73.123. Thus, unlike the Fairness Doctrine, the "equal time," "personal attack," and "political editorializing" rules grant a particular group or individual a limited "right of access" to the airways not subject to the "journalistic supervision" of the broadcaster.

perhaps most important, who shall speak. Given this doctrinal framework, I can only conclude that the Fairness Doctrine, standing alone, is insufficient—in theory as well as in practice—to provide the kind of "uninhibited, robust, and wide-open" exchange of views to which the public is constitutionally entitled.

As a practical matter, the Court's reliance on the Fairness Doctrine as an "adequate" alternative to editorial advertising seriously overestimates the ability—or willingness—of broadcasters to expose the public to the "widest possible dissemination of information from diverse and antagonistic sources." [22] As Professor Jaffe has noted, "there is considerable possibility that the broadcaster will exercise a large amount of self-censorship and try to avoid as much controversy as he safely can." [23] Indeed, in light of the strong interest of broadcasters in maximizing their audience, and therefore their profits, it seems almost naive to expect the majority of broadcasters to produce the variety and controversiality of material necessary to reflect a full spectrum of viewpoints. Stated simply, angry customers are not good customers and, in the commercial world of mass communications, it is simply "bad business" to espouse—or even to allow others to espouse—the heterodox or the controversial. As a result, even under the Fairness Doctrine, broadcasters generally tend to permit only established—or at least moderated—views to enter the broadcast world's "marketplace of ideas." [24]

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[22] *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945).

[23] Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768, 773 n. 26 (1972).

[24] See generally D. Lacy, Freedom and Communications 69 (1961); Mallamud, The Broadcast Licensee as Fiduciary: Toward the Enforcement of Discretion, 1973 Duke L. J. 89, 94–95, 98–99; Jaffe, *supra*, n. 23, at 773, 26; Canby, The First Amendment Right to Persuade: Access to Radio and Television, 19 U. C. L. A. L. Rev. 723, 727 (1972); Malone, Broadcasting, The Reluctant

Moreover, the Court's reliance on the Fairness Doctrine as the *sole* means of informing the public seriously misconceives and underestimates the public's interest in receiving ideas and information directly from the advocates of those ideas without the interposition of journalistic middlemen. Under the Fairness Doctrine, broadcasters decide what issues are "important," how "fully" to cover them, and what format, time and style of coverage are "appropriate." The retention of such *absolute* control in the hands of a few government licensees is inimical to the First Amendment, for vigorous,

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Dragon: Will the First Amendment Right of Access End the Suppressing of Controversial Ideas?, 5 U. Mich. J. L. Rev. 193, 205–211, 216 (1972); Johnson & Westen, A Twentieth Century Soapbox: The Right to Purchase Radio and Television Time, 57 Va. L. Rev. 547 (1971); Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967); Note, Free Speech and the Mass Media, 57 Va. L. Rev. 636 (1971); Note, A Fair Break for Controversial Speakers: Limitations of the Fairness Doctrine and the Need for Individual Access, 39 Geo. Wash. L. Rev. 532 (1971); Note, Wasteland Revisited: A Modest Attack Upon the FCC's Category System, 17 U. C. L. A. L. Rev. 868, 870–875 (1970); Comment, Freedom of Speech and the Individual's Right of Access to the Airways, 1970 Law & Social Order 424, 428; Note, FCC's Fairness Regulations: A First Step Towards Creation of a Right of Access to the Mass Media, 54 Corn. L. Rev. 294, 296 (1969).

Although admitting that the Fairness Doctrine "has not always brought to the public perfect or indeed even consistently high quality treatment of all public events and issues," the Court nevertheless suggests that a broadcaster who fails to fulfill his fairness obligations does so "at the risk of losing his license." *Ante*, at —. The Court does not cite a single instance, however, in which this sanction has ever been invoked because of a broadcaster's failure to comply with the Fairness Doctrine. Indeed, this is not surprising, for the Commission has acted with great reluctance in this area, intervening in only the most extreme cases of broadcaster abuse. See Mallamud, *supra*, at 115–122; Canby, *supra*, at 725–727; Mallone, *supra*, at 215–216; see also Cox & Johnson, *Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study*, 14 F. C. C. 2d 1 (1969).

free debate can be attained only when members of the public have at least *some* opportunity to take the initiative and editorial control into their own hands.

Our legal system reflects a belief that truth is best illuminated by a collision of genuine advocates. Under the Fairness Doctrine, however, accompanied by an absolute ban on editorial advertising, the public is compelled to rely *exclusively* on the "journalistic discretion" of broadcasters, who serve in theory as surrogate spokesmen for all sides of all issues. This separation of the advocate from the expression of his views can serve only to diminish the effectiveness of that expression. Indeed, we emphasized this fact in *Red Lion:* [25]

> "Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them."

Thus, if the public is to be honestly and forthrightly apprised of opposing views on controversial issues, it is imperative that citizens be permitted at least *some* opportunity to speak directly for themselves as genuine advocates on issues that concern them.

Moreover, to the extent that broadcasters actually permit citizens to appear on "their" airwaves under the Fairness Doctrine, such appearances are subject to extensive editorial control. Yet it is clear that the effectiveness of an individual's expression of his views is as dependent on the style and format of presentation as

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[25] *Red Lion Broadcasting Co.* v. *FCC, supra,* at 392 n. 18, quoting J. Mill, On Liberty 32 (R. McCallum ed. 1947).

it is on the content itself. And the relegation of an individual's views to such tightly controlled formats as the news, documentaries, edited interviews, or panel discussions may tend to minimize, rather than maximize the effectiveness of speech. Under a limited scheme of editorial advertising, however, the crucial editorial controls are in the speaker's own hands.

Nor is this case concerned solely with the adequacy of coverage of those views and issues which generally are recognized as "newsworthy." For also at stake is the right of the public to receive suitable access to new and generally unperceived ideas and opinions. Under the Fairness Doctrine, the broadcaster is required to present only *"representative* community views and voices on controversial issues" of public importance.[26] Thus, by definition, the Fairness Doctrine tends to perpetuate coverage of those "views and voices" that are already established, while failing to provide for exposure of the public to those "views and voices" that are novel, unorthodox or unrepresentative of prevailing opinion.[27]

Finally, it should be noted that the Fairness Doctrine permits, indeed *requires*, broadcasters to determine for themselves which views and issues are sufficienty "important" to warrant discussion. The briefs of the broadcaster-petitioners in this case illustrate the type of "jour-

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[26] *Democratic National Committee, supra*, n. 1, at 222.

[27] Indeed, the failure to provide adequate means for groups and individuals to bring new issues or ideas to the attention of the public explains, at least to some extent, "the development of new media to convey unorthodox, unpopular, and new ideas. Sit-ins and demonstrations testify to . . . the inability to secure access to the conventional means of reaching and changing public opinion. [For by] the bizarre and unsettling nature of his technique, the demonstrator hopes to arrest and divert attention long enough to compel the public to ponder his message." *Barron, supra*, n. 24, at 1647; cf. *Adderley* v. *Florida*, 385 U. S. 39, 50–51 (1966) (DOUGLAS, J., dissenting).

nalistic discretion" licensees now exercise in this regard. Thus, ABC suggests that it would refuse to air those views which *it* considers "scandalous" or "crackpot," [28] while CBS would exclude those issues or opinions that are "insignificant" [29] or "trivial." [30] Similarly, NBC would bar speech that strays "beyond the bounds of normally accepted taste," [31] and WTOP would protect the public from subjects that are "slight, parochial or inappropriate." [32]

The genius of the First Amendment, however, is that it has always defined what the public ought to hear by permitting speakers to say what they wish. As the Court of Appeals recognized, "[i]t has traditionally been thought that the best judge of the importance of a particular viewpoint or issue is the individual or group holding the viewpoint and wishing to communicate it to others." 450 F. 2d, at 656. Indeed, "supervised and ordained discussion" is directly contrary to the underlying purposes of the First Amendment,[33] for that Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." [34] Thus, in a related context, we have explicitly recognized that editorial advertisements constitute "an important outlet for the promulgation of information and ideas by persons who do not themselves have access to [media] facilities," and the unavailability of such editorial advertising can serve

[28] Brief for American Broadcasting Companies, Inc. 52.

[29] Brief for Columbia Broadcasting System, Inc. 34.

[30] *Id.*, at 40.

[31] Brief for National Broadcasting Company, Inc. 10.

[32] Brief for Post-Newsweek Stations, Capital Area, Inc. 31.

[33] *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503 (1969).

[34] *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (SDNY 1943), aff'd, 326 U. S. 1 (1945). See also *Thomas* v. *Collins*, 323 U. S. 516, 545 (1945) (Jackson, J., concurring).

only "to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'" *New York Times Co.* v. *Sullivan, supra,* at 266.

The Fairness Doctrine's requirement of full and fair coverage of controversial issues is, beyond doubt, a commendable and, indeed, essential tool for effective regulation of the broadcast industry. But, standing alone, it simply cannot eliminate the need for a further, complementary airing of controversial views through the limited availability of editorial advertising. Indeed, the availability of at least *some* opportunity for editorial advertising is imperative if we are ever to attain the "free and general discussion of public matters [that] seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." *Grosjean* v. *American Press Co.,* 297 U. S. 233, 250 (1936).

III

Moreover, a proper balancing of the competing First Amendment interests at stake in this controversy must consider, not only the interests of broadcasters and of the listening and viewing public, but also the independent First Amendment interest of groups and individuals in effective self-expression. See, *e. g.,* T. Emerson, Toward a General Theory of the First Amendment 4–7 (1967); Z. Chafee, Free Speech in the United States 33 (1941). "[S]peech concerning public affairs . . . is the essence of self-government," *Garrison* v. *Louisiana,* 379 U. S. 64, 74–75 (1964), and the First Amendment must therefore safeguard not only the right of the public to *hear* debate, but also the right of individuals to *participate* in that debate and to attempt to persuade others to their points of view. See, *e. g., Thomas* v. *Collins,* 323 U. S. 516, 537 (1945); cf. *NAACP* v. *Button,* 371 U. S. 415, 429–430 (1963). And, in a time of apparently growing

anonymity of the individual in our society, it is imperative that we take special care to preserve the vital First Amendment interest in assuring "self-fulfillment [of expression] for each individual." *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972). For our citizens may now find greater than ever the need to express their own views directly to the public, rather than through a governmentally appointed surrogate, if they are to feel that they can achieve at least some measure of control over their own destinies.

In light of these considerations, the Court would concede, I assume, that our citizens have at least an abstract right to express their views on controversial issues of public importance. But freedom of speech does not exist in the abstract. On the contrary, the right to speak can flourish only if it is allowed to operate in an effective forum—whether it be a public park, a schoolroom, a town meeting hall, a soapbox, or a radio and television frequency. For in the absence of an effective means of communication, the right to speak would ring hollow indeed. And, in recognition of these principles, we have consistently held that the First Amendment embodies not only the abstract right to be free from censorship, but also the right of an individual to utilize an appropriate and effective medium for the expression of his views. See, *e. g.*, *Lloyd Corp., Ltd.* v. *Tanner*, 407 U. S. 551, 559 (1972); *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503 (1969); *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 (1968); *Brown* v. *Louisiana*, 383 U. S. 131 (1966); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Kunz* v. *New York*, 340 U. S. 290 (1951); *Marsh* v. *Alabama*, 326 U. S. 501 (1946); *Jamison* v. *Texas*, 318 U. S. 413 (1943); *Schneider* v. *State*, 308 U. S. 147 (1939); *Hague* v. *CIO*, 307 U. S. 496 (1939).

Here, of course, there can be no doubt that the broadcast frequencies allotted to the various radio and television licensees constitute appropriate "forums" for the discussion of controversial issues of public importance.[35] Indeed, unlike the streets, parks, public libraries and other "forums" that we have held to be appropriate for the exercise of First Amendment rights, the broadcast media are dedicated *specifically* to communication. And, since the expression of ideas—whether political, commercial, musical or otherwise—is the exclusive purpose of the broadcast spectrum, it seems clear that the adop-

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[35] The Court does make the rather novel suggestion, however, that editorial advertising might indeed be "inappropriate" because "listeners and viewers constitute a 'captive audience.'" *Ante*, at —. In support of this proposition, the Court cites our decisions in *Public Utilities Commission* v. *Pollak*, *supra*, and *Kovacs* v. *Cooper*, 336 U. S. 77 (1949). In *Pollak*, however, we explicitly *rejected* a claim that the broadcasting of radio programs in streetcars violated the First and Fifth Amendment rights of passengers who did not wish to listen to those programs. And in *Kovacs*, although we upheld an ordinance forbidding the use on public streets of sound trucks which emit "loud or raucous noises," we did so because the ordinance was concerned, not with the *content* of speech, but rather with the offensiveness of the sounds themselves. Here, however, the Court seems perfectly willing to allow broadcasters to continue to invade the "privacy" of the home through commercial advertising and even controversial programming under the Fairness Doctrine. Thus, the Court draws its line solely on the basis of the content of the particular speech involved and, of course, we have consistently held that, where content is at issue, constitutionally protected speech may not be prohibited because of a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular idea." *Tinker* v. *Des Moines Independent Community School District*, *supra*, at 509; see, *e. g.*, *Grayned* v. *City of Rockford*, 408 U. S. 104, 117 (1972). The suggestion that constitutionally protected speech may be banned because some persons may find the ideas expressed offensive is, in itself, offensive to the very meaning of the First Amendment.

tion of a limited scheme of editorial advertising would in no sense divert that spectrum from its intended use. Cf. *Lloyd Corp., Ltd.* v. *Tanner, supra,* at 563; *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc., supra,* at 320.

Moreover, it is equally clear that, with the assistance of the Federal Government, the broadcast industry has become what is potentially the most efficient and effective "marketplace of ideas" ever devised.[36] Indeed, the electronic media are today "the public's primary source of information,"[37] and we have ourselves recognized that broadcast "technology . . . supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news. . . ." *Red Lion Broadcasting Co.* v. *FCC, supra,* at 386 n. 15. Thus, although "full and free discussion" of ideas may have been a reality in the heyday of political pamphleteering, modern technological developments in the field of communications have made the soapbox orator and the

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[36] Indeed, approximately 95% of American homes contain at least one television set, and that set is turned on for an average of more than five and one-half hours per day. See Hearings on H. R. 13721 before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess., 7 (1970) (statement of Dean Burch, Chairman of the Federal Communications Commission). As to the potential influence of the electronic media on American thought, see generally A. Krock, The Consent of the Governed 66 (1971); H. Mendelsohn & I. Crespi, Polls, Television, and the New Politics 256, 264 (1970); Malone, *supra,* n. 24, at 197.

[37] H. R. Rep. No. 91–257, 91st Cong., 1st Sess., 6 (1969). According to one study, 67% of Americans prefer the electronic media to other sources of information. See G. Wyckoff, The Image Candidates 13–14 (1968). See also *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules,* 22 F. C. C. 2d 339, 344 (1970) (59% of Americans depend on television as their principal source of news).

leafleteer virtually obsolete. And, in light of the current dominance of the electronic media as the most effective means of reaching the public, any policy that *absolutely* denies citizens access to the airwaves necessarily renders even the concept of "full and free discussion" practically meaningless.

Regrettably, it is precisely such a policy that the Court upholds today. And, since effectuation of the individual's right to speak through a limited scheme of editorial advertising can serve only to further, rather than to inhibit, the public's interest in receiving suitable exposure to "uninhibited, robust, and wide-open" debate on controversial issues, the challenged ban can be upheld only if it is determined that such editorial advertising would unjustifiably impair the broadcaster's assertedly overriding interest in exercising *absolute* control over "his" frequency.[38] Such an analysis, however, hardly reflects the delicate balancing of interests that this sensitive question demands. Indeed, this "absolutist" approach wholly disregards the competing First Amendment rights of all "non-broadcaster" citizens, ignores the teachings of our recent decision in *Red Lion Broadcasting Co.* v. *FCC*, *supra*, and is not supported by the historical purposes underlying broadcast regulation in this Nation.

Prior to 1927, it must be remembered, it was clearly recognized that the broadcast spectrum was part of the public domain. As a result, the allocation of frequen-

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[38] It should be noted that, although the Fairness Doctrine is at least arguably relevant to the *public's* interest in receiving suitable exposure to "uninhibited, robust, and wide-open" debate on controversial issues, it is not in any sense relevant to the *individual's* interest in obtaining access to the airwaves for the purpose of effective self-expression. For the individual's interest in expressing his own views in a manner of his own choosing is an inherently personal one, and it can never be satisfied by the expression of "similar" views by a surrogate spokesman.

cies was left entirely to the private sector,[39] and groups and individuals therefore had the same right of access to radio facilities as they had, and still have, to the printed press—that is, "anyone who will may transmit." [40] Under this scheme, however, the number of broadcasters increased so dramatically that by 1927 every frequency was occupied by at least one station, and many were occupied by several. "The result was confusion and chaos. With everybody on the air, nobody could be heard." *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 212 (1943). It soon became "apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, at 376. Thus, in the Radio Act of 1927, 44 Stat. 1162 (1927), Congress placed the broadcast spectrum under federal regulation and sought to reconcile competing uses of the airwaves by setting aside a limited number of frequencies for each of the important uses of radio.[41] And, since the number of frequencies allocated to public broadcasting was necessarily limited, the Government was compelled to grant licenses to some applicants while denying them to others. See generally *Red Lion Broadcasting Co.* v. *FCC*, *supra*, at 375–377, 388; *National Broadcasting Co.* v. *United States*, *supra*, at 210–214.

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[39] Indeed, pre-1927 regulation of radio gave no discretion to the Federal Government to deny the right to operate a broadcast station. See 1 A. Socolow, The Law of Radio Broadcasting 38 (1939); H. Warner, Radio & Television Law 757 *et seq.* (1948); see generally *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 210–214 (1943).

[40] 67 Cong. Rec. 5479 (Rep. White).

[41] These include, of course, not only public broadcasting, but also "amateur operation, aircraft, police, defense, and navigation. . . ." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, at 388.

Although the overriding need to avoid overcrowding of the airwaves clearly justifies the imposition of a ceiling on the number of individuals who will be permitted to operate broadcast stations[42] and, indeed, renders it "idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish,"[43] it does not in any sense dictate that the continuing First Amendment rights of all nonlicensees be brushed aside entirely. Under the existing system, broadcast licensees are granted a preferred status with respect to the airwaves, not because they have competed successfully in the free market but, rather, "because of their initial government selection. . . ." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, at 400. And, in return for that "preferred status," licensees must respect the competing First Amendment rights of others. Thus, although the broadcaster has a clear First Amendment right to be free from Government censorship in the expression of his own views[44] and, indeed, has a significant interest in exercising reasonable

[42] Although this licensing scheme necessarily restricts the First Amendment rights of those groups or individuals who are denied the "right" to operate a broadcast station, it does not, in and of itself, violate the First Amendment. For it has long been recognized that when "[c]onflicting demands on the same [forum] . . . compel the [Government] to make choices among potential users and uses," neutral rules of allocation to govern that scarce communications resource are not *per se* unconstitutional. *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 98 (1972); cf. *Cox* v. *Louisiana*, 379 U. S. 536, 554 (1965); *Cox* v. *New Hampshire*, 312 U. S. 369, 374 (1940); *Schneider* v. *State*, 308 U. S. 147, 160 (1939). And, in the context of broadcasting, it would be ironic indeed "if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible . . . by limiting the number of licenses so as not to overcrowd the spectrum." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, at 389.

[43] *Red Lion Broadcasting Co.* v. *FCC*, *supra*, at 388.

[44] See, *e. g.*, 47 U. S. C. § 326.

journalistic control over the use of his facilities, "[*t*]*he right of free speech of a broadcaster . . . does not embrace a right to snuff out the free speech of others.*" *Id.*, at 387. Indeed, after careful consideration of the nature of broadcast regulation in this country, we have specifically declared that

> ". . . as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to . . . monopolize a radio frequency to the exclusion of his fellow citizens." *Id.*, at 389.

Because I believe this view is as sound today as when voiced only four years ago, I can only conclude that there is simply no overriding First Amendment interest of broadcasters that can justify the *absolute* exclusion of virtually all of our citizens from the most effective "marketplace of ideas" ever devised.

This is not to say, of course, that broadcasters have *no* First Amendment interest in exercising journalistic supervision over the use of their facilities. On the contrary, such an interest does indeed exist, and it is an interest that must be weighed heavily in any legitimate effort to balance the competing First Amendment interests involved in this case. In striking such a balance, however, it must be emphasized that this case deals *only* with the allocation of *advertising* time—airtime that broadcasters regularly relinquish to others without the retention of significant editorial control. Thus, we are concerned here not with the speech of broadcasters themselves [45] but, rather, with their "right" to decide which

[45] Thus, as the Court of Appeals recognized, "[i]n normal programming time, closely controlled and edited by broadcasters, the constellation of constitutional interests would be substantially different." 450 F. 2d, at 654.

other individuals will be given an opportunity to speak in a forum that has already been opened to the public.

Viewed in this context, the *absolute* ban on editorial advertising seems particularly offensive because, although broadcasters refuse to sell any airtime whatever to groups or individuals wishing to speak out on controversial issues of public importance, they make such airtime readily available to those "commercial" advertisers who seek to peddle their goods and services to the public. Thus, as the system now operates, any person wishing to market a particular brand of beer, soap, toothpaste, or deodorant has direct, personal, and instantaneous access to the electronic media. He can present his own message, in his own words, in any format he selects and at a time of his own choosing. Yet a similar individual seeking to discuss war, peace, pollution, or the suffering of the poor is denied this right to speak. Instead, he is compelled to rely on the beneficence of a corporate "trustee" appointed by the Government to argue his case for him.

It has long been recognized, however, that although access to public forums may be subjected to reasonable "time, place, and manner" regulations,[46] "[s]elective exclusions from a public forum may not be based on *content* alone. . . ." *Police Dept. of Chicago* v. *Mosley*, *supra*, at 96 (emphasis added); see, *e. g.*, *Shuttlesworth* v. *City of Birmingham*, 394 U. S. 147 (1969); *Edwards* v. *South Carolina*, *supra*; *Fowler* v. *Rhode Island*, 354 U. S. 67 (1953); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951); *Saia* v. *New York*, 334 U. S. 558 (1948). Here, of course, the differential treatment accorded "commer-

[46] See, *e. g.*, *Police Dept. of Chicago* v. *Mosley*, *supra*, at 98; *Grayned* v. *City of Rockford*, *supra*, at 115; *Cox* v. *Louisiana*, *supra*, at 554; *Poulos* v. *New Hampshire*, 345 U. S. 395, 398 (1953); *Cox* v. *New Hampshire*, *supra*, at 575–576; *Schneider* v. *State*, *supra*, at 160.

cial" and "controversial" speech clearly violates that principle.[47] Moreover, and not without some irony, the favored treatment given "commercial" speech under the existing scheme clearly reverses traditional First Amendment priorities. For it has generally been understood that "commercial" speech enjoys *less* First Amendment protection than speech directed at the discussion of controversial issues of public importance. See, *e. g., Breard* v. *City of Alexandria,* 341 U. S. 622 (1951); *Valentine* v. *Chrestensen,* 316 D. S. 52 (1942).

The First Amendment values of individual self-fulfillment through expression and individual participation in public debate are central to our concept of liberty. If these values are to survive in the age of technology, it is essential that individuals be permitted at least *some* opportunity to express their views on public issues over the electronic media. Balancing those interests against the limited interest of broadcasters in exercising "journalistic supervision" over the mere allocation of *advertising* time that is already made available to some members of the public, I simply cannot conclude that the interest of broadcasters must prevail.

IV

Finally, the Court raises the spectre of administrative apocalypse as justification for its decision today. The Court's fears derive largely from the assumption, implicit in its analysis, that the Court of Appeals mandated an *absolute* right of access to the airwaves In reality, however, the issue in this case is not whether there is an *absolute* right of access but, rather, whether there may

[47] Contrary to the Court's assertion, the existence of the Fairness Doctrine cannot in any sense rationalize this discrimination. Indeed, the Fairness Doctrine is wholly unresponsive to the need for individual access to the airwaves for the purpose of effective self-expression. See also n. 38, *supra.*

be an *absolute denial* of such access. The difference is, of course, crucial, and the Court's misconception of the issue seriously distorts its evaluation of the administrative difficulties that an invalidation of the absolute ban might conceivably entail.

Specifically, the Court hypothesizes three potential sources of difficulty: (1) the availability of editorial advertising might, in the absence of adjustments in the system, tend to favor the wealthy; (2) application of the Fairness Doctrine to editorial advertising might adversely affect the operation of that doctrine; and (3) regulation of editorial advertising might lead to an enlargement of Government control over the content of broadcast discussion. These are, of course, legitimate and, indeed, important concerns. But, at the present time, they are concerns—not realities. We simply have no sure way of knowing whether, and to what extent, if any, these potential difficulties will actually materialize. The Court's bare assumption that these hypothetical problems are both inevitable and insurmountable indicates an utter lack of confidence in the ability of the Commission and licensees to adjust to the changing conditions of a dynamic medium. This sudden lack of confidence is, of course, strikingly inconsistent with the general propositions underlying all other aspects of the Court's approach to this case.

Moreover, it is noteworthy that, some 25 years ago, the Commission itself declared that

> ". . . the operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues . . . is inconsistent with the concept of public interest. . . . The Commission recognizes that good program balance may not permit the sale or donation of time

> to all who may seek it for such purposes and that difficult problems calling for careful judgment on the part of station management may be involved in deciding among applicants for time when all cannot be accommodated. However, competent management should be able to meet such problems in the public interest and with fairness to all concerned. The fact that it placed an arduous task on management should not be made a reason for evading the issue by a strict rule against the sale of time for any programs of the type mentioned." *United Broadcasting Co.*, 10 F. C. C. 515, 518 (1945).

I can see no reason why the Commission and licensees should be deemed any less competent today then they were in 1945. And even if intervening developments have increased the complexities involved in implementing a limited right of access, there is certainly no dearth of proposed solutions to the potential difficulties feared by the Court. See, *e. g.*, Canby, The First Amendment Right to Persuade: Access to Radio and Television, 19 U. C. L. A. L. Rev. 723, 754–757 (1972); Malone, Broadcasting, the Reluctant Dragon: Will the First Amendment Right of Access End Suppressing of Controversial Ideas?, 5 U. Mich. J. L. Ref. 193, 252–269 (1972); Johnson & Westen, A Twentieth-Century Soapbox: The Right to Purchase Radio and Television Time, 57 Va. L. Rev. 574 (1971); Note, 85 Harv. L. Rev. 689, 693–699 (1972).

With these considerations in mind, the Court of Appeals confined itself to invalidating the flat ban alone, leaving broad latitude [48] to the Commission and licensees

[48] The Court of Appeals did, however, suggest certain possible contours of implementation. For example, the court noted that broadcasters should be permitted "to place an outside limit on the

to develop in the first instance reasonable regulations to govern the availability of editorial advertising. In the context of this case, this was surely the wisest course to follow, for "if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing [First Amendment values], there will be time enough to reconsider the constitutional implications." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, at 393.

For the present, however, and until such time as these assertedly "overriding" administrative difficulties actually materialize, if ever, I must agree with the conclusion of the Court of Appeals that although "it may unsettle some of us to see an antiwar message or a political party message in the accustomed place of a soap or beer commercial . . . we must not equate what is habitual with what is right—or what is constitutional. A society already so saturated with commercialism can well afford another outlet for speech on public issues. All that we may lose is some of our apathy." [49]

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total amount of editorial advertising they will sell," and "reasonable regulation of the placement of advertisements is altogether proper." 450 F. 2d, at 663.

[49] 450 F. 2d, at 665–666.